Supreme Court, U.S.
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No. IN THE CASE

In the Supreme Court of the United States

JOHN GILLARD,

Petitioner,

v.

BETTY MITCHELL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED
(Capital Case)

I. Whether the *Sullivan* presumption applies to a case where one attorney represents the defendant and a witness implicated in the same shootings, and the trial court appoints separate counsel for the witness prior to the witness testifying near the conclusion of the trial?

II. Whether a trial court has a duty to inquire of the defendant on trial when the prosecution raises a conflict of interest?

III. Whether cumulative error is a cognizable claim in federal habeas corpus review?

STATEMENT OF INTERESTED PARTIES

All parties to this case are named in the caption. No party to this case is a non-governmental corporation requiring a corporate disclosure statement as to publicly held ownership interests pursuant to Rule 29.6 of the Rules of this Court.

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OPINIONS BELOW

The opinion of the court of appeals [Apx. p. 3a] is reported as *Gillard v. Mitchell*, 445 F.3d 883 (6th Cir. 2006). The order of the *en banc* court denying rehearing [Apx. p. 1a] is unreported. The opinion of the district court granting relief [Apx. p. 29a] is unreported but included in the joint appendix.

The decision of the state court of appeals reversing the conviction [Apx. p. 233a] is *State v. Gillard*, No. CA-6701, 1987 WL 5768 (Stark App. Jan. 21, 1987). The decision of the Ohio Supreme Court reversing and remanding the case [Apx. p. 215a] is *State v. Gillard*, 40 Ohio St. 3d 226, 533 N.E. 2d 315 (1988). The decision of the state court of appeals affirming the sentence of death [Apx. p. 208a] is *State v. Gillard*, No. CA 6701, 1990 Ohio App. Lexis 2664 (Stark App. June 25, 1990). The decision of the Ohio Supreme Court remanding the case for a hearing on the conflict of interest [Apx. p. 194a] is found at *State v. Gillard*, 64 Ohio St. 3d 304, 595 N.E. 2d 878 (1992). The decision of the remand court on the conflict of interest [Apx. p. 179a] is unreported but included in the joint appendix. The decision of the Ohio Supreme Court affirming as to the denial of relief on the conflict of interest [Apx. p. 150a] is found at *State v. Gillard*, 78 Ohio St. 3d 548, 679 N.E. 2d 276 (1997).

JURISDICTION

The Court of Appeals issued its opinion on April 26, 2006, and denied Petitioner John Gillard's timely Petition for Rehearing En Banc on August 31, 2006. Gillard invokes this Court's jurisdiction under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

This case involves the Sixth and Fourteenth Amendments to the United States Constitution, which provide in relevant part:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const., amend. VI.

"No state shall . . . deprive any person of life [or] liberty . . . without due process of law . . ." U.S. Const., amend. XIV.

28 U.S.C. § 2254(d)(2) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Petitioner John Gillard is condemned to die for shooting three people. His brother, William, is free. It was not John Gillard, but his brother *William*, who attended the fatal 1985 New Year's Eve party. There, Leroy Ensign beat *William* and forcibly ejected him from the party. [Trial, Vol. XI, p. 11]. In the early morning hours of 1985, *William* returned and fired a hand gun in the air. [*Id.* at 16]. Shortly thereafter, Ensign and Denise Maxwell were shot at close range and killed. A third victim, Ron Postlethwaite, survived with a gunshot to the head. After the police spoke to Postlethwaite and others, they put out an all points bulletin for a truck driven by *William*, [*id.*], the truck seen leaving the scene of the shootings, [*id.* at 269, 322].

Within hours of the shootings, *William* asked to borrow money from a friend because he was in trouble and needed to leave town. [Traverse, Exhibit K, 1-3-85 Police Report]. Four hours after the shootings, the Ohio Highway Patrol caught *William* alone fleeing the state. [Trial, Vol. XII, pp. 323-27]. He gave a false name. [*Id.* at 327].

The police found on *William* a .380 caliber cartridge that matched the cartridges removed from the victims. [*Id.* at 339, 354]. *William*'s clothing had eight blood spots consistent with the blood of at least two of the three victims and potentially all three. [Traverse, Exhibit N-3, 5-03-85 BCI Report]. One blood stain on *William's* jacket contained rare markers that only four percent of the population, including Ensign (one of the victims), possessed. [Traverse, Exhibit N-2, 1-25-85 BCI Report]. The blood also formed the pattern of high velocity blood spatter from a gunshot wound. This spatter would have traveled a maximum of twenty-four inches from impact,

placing *William's* clothing within two feet of the victims at the moment they were shot. [Traverse, Exhibit N, Hill Affidavit].

The State did not issue an arrest warrant for John Gillard until January 2nd. [Trial, Vol. XVI, p. 60]. Nevertheless, the State emphatically claimed at trial that Ron Postlethwaite identified John Gillard as the shooter immediately after the shootings. [Trial, Vol. X, pp. 678, 776; Vol. XXVI, pp. 31-32]. However, the lead investigator later admitted in federal habeas proceedings that the investigation first focused on William Gillard because Postlethwaite's injuries made it "difficult" to talk to him. [Traverse, Exhibit E, Steiner Dep. pp. 33-35].[1] And while Postlethwaite claimed to know John Gillard if he saw him, Postlethwaite also testified that he had at least eight beers and was sleeping in a poorly lit room at the time of the shootings. [Trial, Vol. XI, p. 44].

John Gillard went to West Virginia to borrow money for a lawyer for William. There, one Ronald Webb, who had read in the newspaper about the shootings, turned in John Gillard. [Trial, Vol. XVII, pp. 340-41]. Webb claimed that on the day he met John Gillard, John confessed: "I pulled the trigger, my brother is taking the fall." [*Id.* at p. 339].

One attorney, Louis Martinez, represented both John and William Gillard at the preliminary hearing. [Prelim., Vol. I, p. 6]. Postlethwaite identified John as the shooter. [*Id.* at pp.

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[1] The police reports produced in federal habeas document that Postlethwaite told persons at the scene that "Gillard did it." [See Traverse Exhibits F and G]. This statement, of course, could refer to John or William Gillard, but it was William who attended the party and returned firing a gun.

26-29]. The court dismissed the charges as to William, but found probable cause as to John.

The Stark County grand jury indicted John Gillard on two counts of aggravated murder, with death penalty specifications, for the homicides of Denise Maxwell and Leroy Ensign. [Indictment].

William remained under investigation. [Trial, Vol. II, p. 41]. Martinez continued to represent both William and John, appearing on William's behalf when the State subpoenaed William to provide a blood sample. [Trial, Vol. XXII, p. 258].

During trial, Martinez challenged the evidence against William even when doing so prejudiced John. In particular, Martinez chose not to use the physical evidence implicating William to support John's innocence, but instead tried to explain it away. [Trial, Vol. XII, pp. 309, 310, 318-19].

The State repeatedly reassured the Jury that William, too, may soon be indicted. [Trial, Vol. II, p. 40; Vol. VI, pp. 804-06; Vol. VII, pp. 2-6]. After the State rested, Martinez called William as a witness. Only then did the prosecution raise a conflict as to Martinez's representation of *William*:

> PROSECUTOR: William Gillard is currently under investigation . . . The Grand Jury has heard evidence on this man . . . and there very well may be a criminal indictment on this man . . .
>
> . . . [I]t is my understanding that Mr. Martinez has represented this man up to this point and I think it becomes clear that there could be a conflict at this point . . .

> I think that we clearly have a conflict of interest here.
>
> MARTINEZ: I will say to this Court that I have represented Bill Gillard in this matter from the very first day. I do not feel that there is a question of a conflict. I think I am capable of advising him of his rights.
> However, you can appoint him a lawyer if you feel that there is a conflict.

[Trial, Vol. XXII, pp. 253-56].

In response, the trial court appointed separate counsel for William, stating to William:

> And the Court finds that there could be a potential conflict of interests with regard to Attorney Martinez representing both you and your brother, John Gillard . . . there may be conflicts in regard to his representing both of you, which would prejudice you, yourself, John Gillard and the State of Ohio, uh, and one or all of those parties, should Mr. Martinez continue as your legal counsel.

[*Id.* pp. 262-65].

However, the trial court did not address John as to the conflict of interest. William's testimony consisted primarily of trying to explain away the physical evidence that implicated William and only William. [*Id.* at 308-36].

The jury found John Gillard guilty on all counts. [Trial, Vol. XXVII, p. 281].

Martinez presented no evidence in the mitigation phase. At the end of mitigation, the jury recommended a death sentence, and the Court sentenced John Gillard to die. [Trial, Vol. XXVIII, pp. 93-96].

On direct appeal, the court reversed for prosecutorial misconduct. *State v. Gillard*, 1987 WL 5768 (Stark App. Jan. 21, 1987), [Apx. p. 233a]. The court concluded: "[T]his death penalty case got off to a bad start and steadily went downhill." *Id.* at *1, [Apx. p. 234a]. Facing the prospect of a retrial, the State reached an agreement with William not to charge him in the shootings in exchange for his testimony against John. [Conflict Hearing, pp. 23-24].

The Ohio Supreme Court reversed. *State v. Gillard*, 40 Ohio St. 3d 226 (1988), [Apx. p. 215a]. Later, after addressing a potential conflict of interests on the merits, the court remanded the case for an evidentiary hearing because "the trial court knew (or at least should have known) that a possible conflict of interest existed which could affect Martinez' representation of appellant." *State v. Gillard*, 64 Ohio St. 3d 304, 312 (1992), [Apx. p. 206a].

A judge, who had not presided over the trial, conducted the evidentiary hearing. Mr. Martinez, who had suffered a stroke, was unable to testify. The court found no actual conflict, emphasizing Martinez's own statement on the record that he believed no conflict existed despite the prosecutor's repeated protests to the contrary. [Judgment Entry, Apx. p. 179a].

The Ohio Supreme Court affirmed. *State v. Gillard*, 78 Ohio St. 3d 548 (1997), [Apx. p. 150a]. The majority held that because William Gillard was not an "alternate suspect," there was a "coincidence of interests," not a "conflict of

interests." *Id.* at 554-55, [Apx. pp. 159a-160a]. The Chief Justice dissented, stating:

> I believe that the evidence clearly shows that an actual conflict of interest existed because Martinez represented both John Gillard and his brother, *William*, who was implicated in these crimes. . . . .
>
> Because Martinez represented both brothers, the choices he made before and during John's trial lead to the inescapable conclusion that Martinez was hampered by divided loyalties that adversely affected his performance. The evidence clearly shows that Martinez's joint representation of John and *William* influenced his selection of witnesses, his overall defense strategy, and his ability to zealously represent the interest of John.

Id. at 559, [Apx. pp. 170a-171a].

John Gillard petitioned for a writ of habeas corpus. The district court granted relief, finding the denial of "the type of legal, unconflicted representation envisioned by the Constitution" because "Attorney Martinez refused to present William as an alternate suspect, made statements and introduced evidence seemingly designed only to protect William, often at John's expense." [Memorandum Opinion and Order, p. 21, Apx. pp. 56a-57a]. In addition, the district court granted relief based upon the cumulative error arising from that conflict and the prosecution's failure to provide favorable evidence that unconflicted counsel could have used to effectively challenge Postlethwaite's identification of John. [*Id.* at 62, Apx. pp. 108a-109a].

The Sixth Circuit reversed. *Gillard v. Mitchell*, 445 F.3d 883 (6th Cir. 2006), [Apx. p. 3a]. For the first time in the case's history and in direct conflict with the state courts, the court characterized the conflict as only arising from a "successive representation." *Id.* at 891, [Apx. p. 12a]. It then refused to apply the *Sullivan* presumption of prejudice. *Id.* The Sixth Circuit also denied rehearing *en banc*. [Apx. p. 1a].

REASONS FOR GRANTING THE WRIT

The Sixth Circuit reversed the district court on two claims: that his counsel labored under an actual conflict of interest and cumulative error. The resolution of both of these issues is in direct conflict with the decisions of other Federal Courts of Appeals.

As to the conflict of interest issue, the Sixth Circuit's decision turned on the categorical refusal to apply the presumption of prejudice in *Cuyler v. Sullivan,* 446 U.S. 335 (1980), to a "successive representation." The Sixth Circuit characterized the representation as "successive" even though one lawyer represented both John and William through pretrial proceedings and most of the trial. Some five other circuits have concluded that *Sullivan* should apply to a "successive representation," at least where the two representations are substantially related. The dicta in this Court's decision in *Mickens v. Taylor*, 535 U.S. 162 (2002), has not resolved the disagreement on this important and recurring issue of Sixth Amendment jurisprudence. For the reasons set forth below, this is an appropriate case to resolve the conflict in the circuits.

In further contradiction of this Court's decisions in *Sullivan* and *Wood v. Georgia*, 450 U.S. 261, 272 n. 18

(1981), the Sixth Circuit held that reversal was not warranted even though the trial court acknowledged the conflict but failed to inquire directly as to the defendant on trial. This claim presents two issues of significant importance: whether the prosecutor's objection is sufficient to trigger the duty to inquire, and if so, whether that duty requires that the trial court actually resolve an actual conflict of interest as to the defendant on trial.

The Sixth Circuit also reversed the district court on the issue of cumulative error. In conflict with *Taylor v. Kentucky*, 436 U.S. 478, 487-88 & n.15 (1978), and in direct conflict with decisions from the Fifth, Seventh, Ninth and Tenth Circuits, the Sixth Circuit held that claims of cumulative error are not cognizable in federal habeas corpus. The Eighth Circuit, however, has reached the same conclusion as the Sixth Circuit. As set forth below, this split in the Circuits results in a fundamental inconsistency as to how state convictions are reviewed in federal habeas corpus.

Underlying the conflicting decisions on these issues is a lack of clarity as to what constitutes "clearly established law" under the Antiterrorism and Effective Death Penalty Act. As to both the conflict and the cumulative error claims, the Sixth Circuit holds in effect that the rule of decision applied by the district court is not "clearly established." In each case, though, there is a clear legal principle established by this Supreme Court which the Sixth Circuit should have applied to the facts of this case.

I. THE *SULLIVAN* PRESUMPTION APPLIES TO A "SUCCESSIVE REPRESENTATION" IN THE SAME MATTER.

In *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980), this Court established that a defendant is entitled to a presumption of prejudice where an "actual conflict of interest adversely affected" his lawyer's performance. In presuming prejudice, *Sullivan* presents a materially different standard than the general ineffective assistance of counsel standard. *See Strickland v. Washington*, 466 U.S. 668, 692-93 (1984) (explaining reasons for presumption of prejudice where actual conflict of interest breaches duty of loyalty, perhaps most fundamental of counsel's duties); *Perillo v. Johnson*, 205 F. 3d 775, 781 (5th Cir. 2000) (*Sullivan* standard "differs substantially from the *Strickland* standard.").

A. Federal Courts Disagree As To Whether *Sullivan* Applies To A "Successive Representation" In The Same Or A Substantially Related Case.

While the importance of *Sullivan* is beyond debate, federal courts have disagreed as to the "guiding principle in this important area of Sixth Amendment jurisprudence." *Perillo v. Johnson*, 205 F. 3d 775, 798 (5th Cir. 2000). In particular, federal courts from at least the Fourth, Fifth, Sixth, Seventh, and Eleventh circuits conflict as to whether the *Sullivan* presumption applies to a "successive representation" case.[2] The conflicting interpretations of *Sullivan* fall into three groups: (1) decisions, such as the Sixth Circuit's in this case,

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[2] "Successive representation occurs where defense counsel has previously represented" another person. *Moss v. United States*, 323 F. 3d 445, 459 (6th Cir. 2003).

that would never apply *Sullivan* to any successive representation, *see Gillard*, 445 F. 3d at 891, [Apx. p. 3a]; (2) decisions that would always apply *Sullivan* to any joint representation, successive or concurrent, *see e.g., United States v. Stitt*, 441 F.3d 297, 303 (4th Cir. 2006) ("we have concluded on multiple occasions that the *Sullivan* presumption applies, even when counsel is not simultaneously representing two or more persons"), *vacated on other grounds*, 459 F.3d 483 (4th Cir. 2006); *Perillo v. Johnson*, 205 F.3d at 798 ("*Cuyler (v. Sullivan)* has routinely been applied to cases involving successive representation"); and (3) decisions applying *Sullivan* to a successive representation but only in the same or substantially related matter, *see United States v. Infante*, 404 F.3d 376, 392 (5th Cir. 2005) (applying the *Sullivan* standard to successive representation of two witnesses and then the defendant in substantially related matter); *Hall v. United States*, 371 F.3d 969, 973 (7th Cir. 2004) (holding *Sullivan* presumption applies where "the attorney's representation of the first client was 'substantially and particularly related to his later representation of defendant'") (quoting *Enoch v. Gramley*, 70 F.3d 1490, 1496 (7th Cir. 1995)); and *Fruend v. Butterworth*, 165 F. 3d 839, 859 (11th Cir. 1999) (en banc) (where successive representation, defendant must demonstrate either earlier representation was substantially related or exchange of confidential information).[3] As set forth below, Petitioner urges this Court to confirm that *Sullivan* applies to a

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[3] Further demonstrating the disarray on this issue, the Sixth Circuit itself has held that *Sullivan* should apply to a "successive representation" of two individuals in the same case. *Moss v. United States*, 323 F.3d 445, 463 (6th Cir. 2003). The opinion was authored by the district judge in this case while sitting by designation.

successive representation in the same case or in closely related cases.

In support of its position, the Sixth Circuit offers this syllogism: (1) simultaneous and successive representations differ materially; (2) the Supreme Court has never held that successive representation gives rise to a presumption of prejudice; and therefore (3) the *Sullivan* presumption does not control this habeas case. *Gillard*, 445 F. 3d at 890-91, [Apx. p. 12a]. As to each assertion, there is basic disagreement between the federal courts of appeals.

The Sixth Circuit decision in this case makes a categorical distinction between successive and simultaneous representation because supposedly with successive representation "the attorney is no longer beholden to the former client." *Gillard*, 445 F. 3d at 891, [Apx. p. 12a]. This is certainly an incorrect statement of an attorney's duties. *See e.g., Swidler & Berlin v. United States*, 524 U.S. 399, 410-11 (1999) (a lawyer's fiduciary relationship to a client survives even the client's death); *Model Rules of Prof'l Conduct*, Rule 1.9, Duties to Former Clients. Beyond this faulty premise, other circuits do not agree that successive and simultaneous representations necessarily materially differ. For instance, the Fifth Circuit "has not definitively embraced the theory that there is any real and inviolate substantive difference between conflicts of interest arising in the context of successive, as opposed to concurrent representation." *Perillo v. Johnson*, 205 F. 3d at 798; *accord*, *Church v. Sullivan*, 942 F. 2d 1501, 1511 (10th Cir. 1991) ("difficult to envision circumstance more fraught with inherent conflict" than when defense counsel must present defense implicating former client, particularly where former representation intertwined factually with current representation.) Indeed, even the Sixth Circuit has held that "the probability of

prejudice dramatically increases in circumstances where the attorney represented a co-defendant during the pre-indictment phase of the same proceeding" - as happened in this case. *Moss v. United States*, 323 F. 3d 445, 462 (6th Cir. 2003).

This case demonstrates well the capriciousness of simply categorizing joint representations as "concurrent" or "successive" because this case does not fit neatly into either category - although it is most appropriately categorized as concurrent. The Sixth Circuit contends that this is "a successive representation" case because the State dismissed the charges against William after the preliminary hearing, and the trial court appointed William separate counsel just before William testified at trial. Neither of these factors should change the application of *Sullivan*. While charges against William were dismissed, William - as the Sixth Circuit's decision acknowledges - "remained a suspect." 445 F. 3d at 891, [Apx. p. 12a]. Indeed, the State repeatedly made clear to the court and jury that it continued to investigate William. [Trial, Vol. II, pp. 40-42], and Martinez continued to represent William with regard to the investigation and well into the trial. [Trial, Vol. XXII, p. 254]. As the Sixth Circuit acknowledges, after the prosecution raised the conflict at trial, "Martinez chose to represent both brothers." 445 F. 3d at 892, [Apx. 15a]. In fact, he never stopped representing both of them. And at the point the trial court appointed separate counsel for William, the prosecution had already rested and the trial was nearly completed. Martinez had already foregone presenting a defense based on the physical and other evidence implicating William.

The Sixth Circuit's categorical approach ignores the real issue. This Supreme Court has emphasized that "(i)n a case of joint representation of conflicting interests the evil—it bears repeating - is in what the advocate finds himself compelled to

refrain from doing. . . ." *Holloway v. Arkansas*, 435 U.S. at 490. And in *Sullivan* itself, the Court held that a "counsel's desire to diminish a co-defendant's guilt" exemplifies the type of "actual conflict" for which prejudice should be presumed. *Id.* at 348-49 (citing *Glasser*, 315 U.S. at 75). The "evil" of a counsel "compelled to refrain from doing" things helpful to one client but harmful to another is readily apparent in this record. Martinez's effort to defend John while not implicating William, or even disassociating the two, demonstrates a paradigmatic conflict of interest.

B. The Governing Legal Principles of *Sullivan* Apply To A Conflict Arising From The Representation Of Two People Implicated In The Same Crime.

The Sixth Circuit's decision never questions the logic or fairness of its categorical approach. Instead, the decision asserts with limited explanation that "because the Supreme Court has not held that successive representation gives rise to a presumption of prejudice, the *Sullivan* presumption does not control this habeas case."[4] *Gillard*, 445 F. 3d at 891, [Apx. p. 12a]. In direct conflict with this decision, the Fifth Circuit in *Perillo v. Johnson*, rejected the argument that a habeas conflict claim arising from a successive representation "is either not governed by *Cuyler* (*v. Sullivan*) or is *Teague-barred* because her claim is not clearly governed by *Cuyler*."[5] 205 F. 3d at 798. Analyzing decisions from a number of

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[4] A more thorough explanation of this position is found in *Schwabb v. Crosby*, 451 F. 3d 1308, 1325 (11th Cir. 2006).

[5] Like this case, the *Teague* argument in *Perillo* presents the same issue as to whether the application of *Sullivan* is "clearly established" outside of multiple concurrent representation. *See Schwabb*, 451 F.3d at 1323.

circuits, the Fifth Circuit applied *Sullivan* to grant relief for a conflict of interest arising from the successive representation of the state's principal witness in a capital murder case and then a defendant in that same case. *Id.*

Even if the situation in this case is a distinct factual context from *Sullivan* – which it is not (*Sullivan* involved the joint representation of three defendants for the same shootings but in three separate trials, 446 U.S. at 337-38) -- this Court has instructed that "clearly established law" under 28 U.S.C. 2254(d) includes "the governing legal principle or principles set forth by the Supreme Court." *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). A state court's refusal to extend these principles to a different but analogous factual context may be unreasonable. *Williams v. Taylor*, 529 U.S. 362, 407 (2000).

Sullivan reaffirmed the clear legal principle that joint representation resulting in a division of an attorney's loyalties violates a defendant's Sixth Amendment rights. *See Sullivan*, 446 U.S. at 348-49; *Strickland*, 466 U.S. at 692. Nothing in *Sullivan* suggests that its concern over an attorney's "struggle to serve two masters" is limited to multiple concurrent representations.[6] *Id.* at 348-49 (quoting *Glasser v. United States*, 315 U.S. 60, 75 (1942)). As the Fifth Circuit has noted, "*Cuyler (v. Sullivan)* can be viewed as a successive representation case." *Perillo v. Johnson*, 205 F.3d at 797.

One year after *Sullivan*, this Court in *Wood v. Georgia*, 450 U.S. 261 (1981), applied the *Sullivan* presumption in a

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[6] While *Mickens* suggests that *Sullivan's* reach is limited to "multiple concurrent representation," *Sullivan* itself does not use that term. *Sullivan* talks about "multiple representation," which can refer to either concurrent or successive representations.

situation which did not involve multiple concurrent representation. There, this Court remanded on its own initiative a probation revocation case for a determination of whether a lawyer paid by an employer, but representing an employee, suffered from an "actual conflict of interest" under *Sullivan*. *Id.* at 273-74. The opinion never suggests that the attorney ever formally represented the employer, but explains that the potential actual conflict derived from the potential divided loyalty in accepting the payment. *Id.* *See also Tueros v. Griener*, 343 F.3d 587, 594 n.4 (2d Cir. 2003) (citing *Wood* as clearly established law supporting that *Sullivan* extends beyond multiple concurrent representation).

The Sixth Circuit's categorical approach in this case fails to address the governing legal principles set forth in *Glasser*, *Holloway*, *Sullivan*, and *Wood*, or the clear evidence demonstrating choices harmful to one client and helpful to another in the record. In quite similar factual contexts, other federal courts of appeals have applied *Sullivan*. *See Hammon v. Ward*, 466 F.3d 919, 929-31 (10th Cir. 2006) (remanding case for evidentiary hearing into "actual conflict" under *Sullivan* where one attorney represented defendant at trial and his brother who pled guilty to related crime before trial); *Sanders v. Ratelle*, 21 F. 3d 1446, 1454-55 (9th Cir. 1994) (granting relief where attorney believed he was "representing family" at murder trial while not presenting full evidence implicating the defendant's brother who was never charged in the shooting).

The Sixth Circuit cites *Mickens v. Taylor*, 535 U.S. 162 (2002), to support its view that the Supreme Court has not held that successive representation gives rise to a presumption of prejudice. In *Mickens*, this Court decided a conflict claim arising from the successive representation of the murder victim and then the defendant charged with that murder under

the "not unreasonable" assumption that the *Sullivan* rule applied. *Id.* at 174. The majority decision then in dicta raised doubt as to whether the "*Sullivan* prophylaxis" should be applied to cases of "successive representation." *Id.* at 176.

Federal courts disagree "over how much attention we should pay to what the Supreme Court told us in *Mickens* about the scope of the *Sullivan* holding." *Schwabb v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006). Most, though, have declined to follow or have distinguished "the dicta" suggesting that *Sullivan* should be limited to multiple concurrent representations. *See e.g., Tueros v. Griener*, 343 F.3d 587, 593-94 (2d Cir. 2003) ("the discussion [in *Mickens*] of the scope of *Sullivan* is dicta; . . . (f)or clearly established Federal law under § 2254(d) we must look to *Sullivan*, not to the *Mickens* postscript"); *Hall v. United States*, 37 F.3d at 974 (noting "dicta" in *Mickens* as to "the application of the *Sullivan* framework in cases of successive representation," but deciding that *Sullivan* should still apply where two matters are "closely interrelated"); *Infante*, 404 F. 3d at 391 n. 12 (same); *Moss*, 323 F.3d at 460-62 (noting *dicta* in *Mickens* but distinguishing it where successive representation in same case); *but see*, *Schwabb*, 451 F. 3d at 1325 (disagreeing with Second Circuit's rejection of "dicta" in *Mickens*).[7]

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[7] Most of the post-*Mickens* decisions that have refused to apply the *Sullivan* framework have involved alleged conflicts arising from circumstances other than joint representation. *See e.g. Schwabb*, 451 F. 3d at 1322 (personal relationship between attorney and witnesses); *Smith v. Hofbauer*, 312 F. 3d 809, 815-18 (6th Cir. 2002) (defense attorney charged with unrelated drug offense), *cert. denied*, 540 U.S. 971 (2003). Like *Sullivan*, this is a joint representation case.

This Court should resolve the conflicting interpretations of the scope of application of *Sullivan*. *Sullivan*, *Holloway*, and *Wood* establish a clear concern for joint representations resulting in divided loyalties. Such a division of loyalties is readily apparent in the record in this case. As the Fifth Circuit has held, "the guiding principle in this important area of Sixth Amendment jurisprudence" should be "whether counsel's allegiance to the accused was compromised by competing obligations owed to other clients." *Perillo*, 205 F. 3d at 798. And the fact that this is a habeas case should not change the result - there should not be one reading of *Sullivan* for habeas cases and another for all other cases. Such a minimalist construction of what constitutes "clearly established law" diminishes the application of this Court's decisions to state court cases, and thus the protections of the writ of habeas corpus itself.

II. ONCE THE PROSECUTION RAISED THE CONFLICT OF INTEREST, THE TRIAL COURT HAD A DUTY TO RESOLVE IT AS TO THE DEFENDANT.

Reversal is mandated "when the trial court has failed to make an inquiry [into a conflict of interest] even though it 'knows or reasonably should know that a particular conflict exists.'" *Wood v. Georgia*, 450 U.S. 261, 272 n. 18 (1981); *accord*, *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980). Unquestionably, the trial court was aware of the conflict in this case. Indeed, it expressly found "there could be a potential conflict of interests" and appointed separate counsel for William. [Trial, Vol. XXII, pp. 261-62].

A. The Prosecutor's Objection Obligated The Trial Court To Inquire.

The Sixth Circuit implies that the trial court's duty to inquire is somehow lessened or eliminated because the "*prosecution* timely objected"—and defense counsel did not. 445 F. 3d at 892, [Apx. pp. 14a-15a]. As this Court's opinions make clear, this distinction does not matter. In *Wood*, as here, the prosecution brought the conflict to the court's attention. 446 U.S. at 272-73 ("[A]ny doubt as to whether the court should have been aware of the problem is dispelled by the fact that the State raised the conflict problem explicitly and asked that the Court look into it."). In *Wheat v. United States*, this Court held a trial court has a duty to investigate when it is "alerted by objection from *one of the parties*." 486 U.S. 153, 161 (1988) (emphasis added). In *Sullivan*, this Court held that the trial court had no duty to inquire, emphasizing that "[N]o participant [without further limitation] ever objected to the multiple representation." *Sullivan*, 446 U.S. at 347. This Court reasoned that "absent special circumstances" there is no duty to inquire. *Id.* at 346. "Special circumstances" are not limited to an objection from the defense, but instead encompass any circumstance where the trial court "knows or should know that a particular conflict exists." *Id.* at 347.[8]

Notwithstanding the language in *Sullivan*, *Wood*, and *Wheat*, that would clearly encompass the facts of this case, in *Mickens v. Taylor*, 535 U.S. 162, 168 (2000), this Court

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[8] The Ohio Supreme Court in remanding the case read *Sullivan* to require an inquiry if the trial court "knows or reasonably should know" of the conflict. *Gillard*, 64 Ohio St.3d at 304, [Apx. p. 202a].

more narrowly expressed the trial court's duty to inquire. *Mickens* speaks of "automatic reversal only where defense counsel is forced to represent codefendants over his timely objection." 535 U.S. at 168. Accordingly, there is a basic discrepancy between *Mickens'* description as to what leads to automatic reversal and the instruction in *Sullivan, Wood,* and *Wheat*. [9]

Furthermore, Martinez's statement that he "did not feel there is a question of a conflict" did not eliminate the trial court's duty to inquire. While the Sixth Circuit states that "the trial court could have properly deferred to Martinez's judgment," *Gillard*, 445 F.3d 892, [Apx. p. 15a], the trial court clearly did not do so. To the contrary, the trial court recognized the potential conflict and appointed separate counsel. The view that a trial court may simply defer to the judgment of the defense attorney is incompatible with this Court's prior instruction. *See Wheat*, 486 U.S. at 160-64 (trial court has duty to police conflicts of interest and can prohibit joint representation even when that is the choice of the defendants and their counsel); *Wood*, 450 U.S. at 265 n.5 (unlikely that the lawyer against whom conflict of interest charge was made would concede "that he continued to act improperly as counsel.").

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[9] Given that *Wood*, *Wheat*, and *Sullivan* were the clearly established law at the time of the relevant state court decision in this case whereas *Mickens* was not, and that the language in *Mickens* is actually dicta (no one objected to the alleged conflict in *Mickens*), this Court should resolve this contradiction in favor of Petitioner.

B. Once Aware of the Potential Conflict, The Trial Court Had A Duty to Resolve It As To The Defendant On Trial.

The Trial Court expressly acknowledged the potential conflict of interest, and even appointed separate counsel for William. [Trial, Vol. XXII, pp. 261-62]. What the trial court did not do was to inquire into the conflict as to John, the defendant on trial; inform him of the dangers in allowing Martinez to continue representing him; or obtain a waiver from him. *See Gillard*, 64 Ohio St.3d at 308 ("the trial court did *not* address *appellant*") (emphasis in the original), [Apx. p. 200a]. Nevertheless, the Sixth Circuit found that the trial court did "all that was required of it." *Gillard*, 445 F.3d at 10, [Apx. p. 14a].

This decision is in conflict with other federal appellate decisions, which read this Court's precedent to mandate that a court aware of a conflict of interest: (1) obviate the risk by substituting conflict-free counsel or allowing the defendant to waive the conflict, or (2) affirmatively establish that there is no conflict. *See, e.g., United States v. Rogers*, 209 F.3d 139, 143 (2d Cir. 2000); *United States v. Gallegos*, 108 F.3d 1272, 1282 (10th Cir. 1997) (citing *Holloway v. Arkansas*, 435 U.S. 475, 483-84 & n. 5 (1978); *accord*, *McFarland v. Yukins*, 356 F.3d 688, 703-05 (6th Cir. 2004) (adopting Tenth Circuit's approach).

Here, the trial court failed to inquire into the conflict's effect on Martinez's representation of John, the defendant on trial. The Court did not appoint John new counsel or obtain a waiver of the conflict. Nor did that court affirmatively establish that there was no conflict – to the contrary, it expressly acknowledged the potential conflict on the record. As the Warden recognized below, "[t]he Ohio Supreme

Court, obviously did not believe that the trial court's 'limited inquiry' satisfied the United States Supreme Court requirement." [Warden's Final Third Br. at 31].

In sum, the duty to inquire claim in this case raises two sub-issues for which there is conflict between decisions of this Court and also decisions of the federal courts of appeals. The resolution of these questions is not only dispositive of this death penalty case, it would provide consistent guidance as to important and recurring Sixth Amendment issues. In fact, as to both conflict questions, this case presents an opportunity to this Court to resolve basic inconsistencies in the application of its Sixth Amendment framework.

III. WHERE CUMULATIVE ERROR DEPRIVES A DEFENDANT OF A FUNDAMENTALLY FAIR TRIAL, FEDERAL HABEAS SHOULD PROVIDE RELIEF FOR SUCH ERROR.

The district granted the writ of habeas corpus because of the cumulative error arising from the conflict of interest and the failure of the prosecution to provide evidence favorable to the accused.[10] The Sixth Circuit reversed the grant of the writ for cumulative error, reasoning that the "'Supreme Court has not held that distinct constitutional claims can be cumulated to grant habeas relief.'" *Gillard*, 445 F.3d at 898 (quotations omitted), [Apx. p. 27a].

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[10] While sustaining Petitioner's cumulative error claim, the district court did not rely upon the full grounds cited by Petitioner, which included the extensive prosecutorial misconduct that resulted in the reversal of the case by the state court of appeals.

This refusal to recognize cumulative error as a claim in federal habeas directly conflicts with decisions of the Fifth, Seventh, Ninth, and Tenth Circuits. *See e.g. Hamilton v. Mullin*, 436 F.3d 1181, 1196-97 (10th Cir. 2006); *Darks v. Mullin*, 327 F.3d 1001, 1018 (10th Cir. 2003) (finding cumulative error review appropriate); *Thomas v. Hubbard*, 273 F.3d 1164, 1179-80 (9th Cir. 2002) (reviewing for cumulative error to determine whether trial as a whole was unfair), *rev'd on other grounds, Payton v. Woodford*, 299 F.3d 815 (9th Cir. 2002) (*en banc*); *Alvarez v. Boyd*, 225 F.3d 820, 824-25 (7th Cir. 2000) (applying cumulative error analysis to post-AEDPA habeas petition); and *Jackson v. Johnson*, 194 F.3d 641, 655 n. 59 (5th Cir. 1999) (reviewing for cumulative error). On the other hand, one other circuit has held cumulative error does not provide a basis for relief under § 2254. *See e.g. Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996) ("errors that are not unconstitutional individually cannot be added together to create a constitutional violation").

Accordingly, the conflict is real. In at least five circuits, federal courts will consider whether cumulative error rendered a state trial fundamentally unfair. The Sixth Circuit and likely still also the Eighth Circuit categorically bar such claims. And while the Sixth Circuit contends the Supreme Court has never recognized cumulative error can be the basis for habeas relief, the Tenth and Seventh Circuits have explained that the cumulative error review is necessarily established in the harmless error doctrine and the due process guarantee of a trial that is fundamentally fair as a whole. *See Darks v. Mullin*, 327 F.3d at 1017; *Alvarez v. Boyd*, 225 F.3d at 824. Furthermore, these courts cite to *Taylor v. Kentucky*, 436 U.S. 478, 487-88 and n.15 (1978), where this Court found the cumulative effect of a series of errors violated the due process guarantee of fundamental fairness. *See also*

Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) (holding Constitution entitles defendant to a fair trial, not a perfect one; no relief unless errors rendered trial fundamentally unfair); *Donnelly v. DeChristoforo*, 416 U.S. 637, 639 (1974) (considering totality of prosecutorial misconduct in context of entire trial to determine if misconduct was sufficiently prejudicial to render trial fundamentally unfair).

The Sixth Circuit's holding again constitutes a minimalist approach to what constitutes "clearly established law." This approach unduly restricts the reach of clear principles articulated by this Court, and ignores that certain constitutional errors, insufficient by themselves to justify relief, may combine synergistically to render a trial fundamentally unfair. *See e.g.*, *Taylor v. Kentucky*, 436 U.S. at 487 and n.15; *Alvarez*, 225 F.3d at 824.[11] Even as to the prosecutorial misconduct claim itself, the Sixth Circuit apparently did not consider the cumulative impact of the misconduct in contravention of *Donnelly*, 416 U.S. at 639.[12]

This issue is not only of significant importance, it is certain to recur. Like the conflict claim, this issue goes to the even broader inconsistency of how federal courts determine what is "clearly established" Supreme Court law.

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[11] Even the Sixth Circuit previously has recognized that "[e]rrors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair." *Walker v. Engle*, 703 F. 2d 959, 963 (6th Cir. 1983).

[12] The Sixth Circuit held that "none of Gillard's examples of alleged prosecutorial misconduct rises to such a level as to justify habeas relief." 445 F.3d at 897, [Apx. p. 25a].

This Court should restore the consistency of federal court review of alleged constitutional error in state courts.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 03-4261/4322

[Filed August 31, 2006]

JOHN GILLARD,
Petitioner-Appellee/Cross-Appellant,

v.

BETTY MITCHELL,
Respondent-Appellant/Cross-Appellee.

BEFORE: SILER, DAUGHTREY, and SUTTON, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other judges of this court, and not judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 03-4261/4322

[Filed April 26, 2006]

JOHN GILLARD, Petitioner-Appellee/Cross-Appellant,	)
v.	)
BETTY MITCHELL, Warden, Respondent-Appellant/Cross-Appellee.	)

Before: SILER, DAUGHTREY, and SUTTON, Circuit Judges.

OPINION

SILER, Circuit Judge. Betty Mitchell (the "Warden") appeals from the district court's order granting in part John Gillard's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Gillard, an Ohio prisoner under a death sentence, cross-appeals from the district court's denial in part of his petition. The district court granted Gillard habeas relief on two issues: his trial counsel labored under a conflict of interest and the cumulation of errors at trial violated his constitutional rights. Because Gillard is not entitled to habeas

relief, we **REVERSE** the district court's order as to those two claims and **AFFIRM** as to all remaining claims.

I. BACKGROUND

In *State v. Gillard*, 40 Ohio St. 3d 226, 533 N.E.2d 272, 274-75, 535 N.E.2d 315 (Ohio 1988), the Ohio Supreme Court related these facts:

> On December 31, 1984, Timothy Hendricks held a New Year's Eve party in his home at 213 Kennet Court, N.W., Canton. Among the guests were Ronnie Postlethwaite, Denise Maxwell, Leroy Ensign, and defendant-appellee's brother William Gillard. During the party, there was a fight between Ensign and Gillard. After Hendricks broke up the fight, William Gillard left.
>
> The party ended between 3:00 and 4:00 a.m., January 1. Seven guests stayed the night, including Ensign, Postlethwaite and Maxwell.
>
> Postlethwaite and Hendricks were both awakened by a gunshot outside. Hendricks went back to sleep. Postlethwaite got up and looked outside; he saw William Gillard fire a second shot into the air from a handgun. Postlethwaite tried unsuccessfully to wake Ensign.
>
> The next thing Postlethwaite recalled was hearing the back door slammed open. He heard heavy steps "[l]ike horses trampling" and then a shot was fired.
>
> Someone grabbed Postlethwaite's hair and pulled his head back. His assailant put a gun against his temple,

shot him, and threw him to the floor. Postlethwaite then saw the gunman aim at Denise Maxwell's head and fire, killing her. Postlethwaite recognized the gunman as John Gillard.

Larry Beck, a neighbor, heard two gunshots between 3:00 and 3:30 a.m. At 4:15, he heard "at least two people" going towards 213 Kennet Court. About twelve minutes later, he heard more gunshots and heard two men running away from 213 Kennet Court.

At approximately 4:50 a.m., Canton police officer Sheldon Godshall arrived. Godshall asked Postlethwaite who had shot him. Postlethwaite said, "Dirty John." Godshall asked, "Dirty John who?" and Postlethwaite replied, "Dirty John Gillard." Another officer found Leroy Ensign's body lying near the entrance of the house.

On January 4, Ronald Webb, his wife, and Donald Gorby were in the kitchen of Webb's downstairs apartment in a two-family house in Wellsburg, West Virginia, when John Gillard came to the door. Webb testified that Gorby introduced Gillard to him as "Butch Johnson." At Gillard's request, Mrs. Webb cut Gillard's hair.

While Gillard was there, Milton Smith, who lived upstairs with Gorby, entered the kitchen, saw Gillard, and said: "Jesus Christ, I didn't recognize you without the beard, Dirty John." Smith and Gillard went upstairs. They eventually came back down to the kitchen, where Smith told Webb " * * * to keep him there and party with him and don't let him go

nowhere, don't take him outside that house, don't take him to no bars." Smith then left.

As they talked, Webb mentioned to Gillard that he had "read in the paper where his brother was in jail for shooting some people in Canton." Gillard replied: "I pulled the trigger, my brother is taking the fall."

Later that day, Webb had a dispute with Gillard and Gorby. Webb threatened to go "to the law," whereupon Gillard said, "I got to get out of here." Webb then reported Gillard's presence to the Brooke County, West Virginia, sheriff's office. As a result, sheriff's deputies and Wellsburg police went to the Webb residence and arrested Gillard. Gillard identified himself to the arresting officers as "Butch Johnson."

John Gillard was indicted for the aggravated murders of Denise Maxwell and Leroy Ensign, and for the attempted aggravated murder of Ronnie Postlethwaite. In each of these three cases, two counts were returned: one charging that the offense was committed with prior calculation and design, R.C. 2903.01(A), and one charging felony murder, R.C. 2903.01(B). Each count of aggravated murder carried two death specifications: one charging a course of conduct involving the purposeful killing of two or more people, R.C. 2929.04(A)(5); and one charging murder coupled with aggravated burglary, R.C. 2929.04(A)(7). A seventh count charged Gillard with aggravated burglary, R.C. 2911.11.

Gillard's alibi defense consisted of testimony that he and Jerri Oney had been at the home of Tracy and

> Melissa Price between 10:30 p.m., December 31, and 4:30 a.m., January 1, and had gone directly from there to Oney's house. Oney and the Prices corroborated this account. Gillard admitted going to Wellsburg and meeting Webb, but denied introducing himself as "Butch Johnson" and telling Webb that he had been "the trigger man." Gillard also denied that Mrs. Webb had cut his hair.

Gillard was convicted of aggravated murder, attempted aggravated murder, and aggravated burglary in 1985. The jury recommended death, which the trial court accepted and sentenced Gillard accordingly. In 1987, however, the Ohio Court of Appeals vacated Gillard's convictions due to prosecutorial misconduct and the trial judge's failure to recuse himself. *See State v. Gillard*, 1987 Ohio App. LEXIS 5687, No. CA-6701, 1987 WL 5768 (Ohio Ct. App. Jan. 21, 1987). The Ohio Supreme Court subsequently reversed this decision, affirmed all of Gillard's convictions, and remanded the matter to the Ohio Court of Appeals to independently review his sentence. *See Gillard*, 533 N.E.2d at 281-82. The same panel of the Ohio Court of Appeals recused itself from reviewing Gillard's sentence. A new three-judge panel was selected and it affirmed Gillard's death sentence. *See State v. Gillard*, 1990 Ohio App. LEXIS 2664, No. CA-6701, 1990 WL 94632 (Ohio Ct. App. June 25, 1990).

Upon Gillard's appeal to the Ohio Supreme Court, he submitted a new claim: his trial counsel labored under a conflict of interest. The Ohio Supreme Court remanded the case to the trial court to conduct an evidentiary hearing. *See State v. Gillard*, 64 Ohio St. 3d 304, 1992 Ohio 48, 595 N.E.2d 878, 883 (Ohio 1992). At the conclusion of the evidentiary hearing, the trial court found no conflict of interest. The Ohio Supreme Court affirmed the conclusion

that there was no conflict of interest, as well as Gillard's conviction and death sentence. *See State v. Gillard*, 78 Ohio St. 3d 548, 1997 Ohio 183, 679 N.E.2d 276, 285 (Ohio 1997).

Thereafter, Gillard's petition for state post-conviction relief was denied by the trial court, and the Ohio Court of Appeals affirmed. *See State v. Gillard*, Nos. 1997CA00318 & 1997CA00410, 1998 Ohio App. LEXIS 3088 (Ohio Ct. App. June 22, 1998). The Ohio Supreme Court declined to hear Gillard's appeal. In 1997, Gillard filed an application to reopen his appeal pursuant to Ohio R. App. P. 26(B), claiming that his appellate counsel was ineffective. The Ohio Court of Appeals granted his motion but concluded that the claims were meritless, and the Ohio Supreme Court affirmed. *See State v. Gillard*, 85 Ohio St. 3d 363, 1999 Ohio 385, 708 N.E.2d 708, 709-10 (Ohio 1999) (*per curiam*).

In 1999, Gillard sought habeas relief in federal court under 28 U.S.C. § 2254. The district court granted relief on two claims: Gillard's counsel acted under a conflict of interest so as to render ineffective assistance, and the cumulation of errors at trial resulted in the denial of Gillard's constitutional rights. Gillard's remaining fifteen claims were rejected as meritless. The Warden appealed and Gillard filed a cross-appeal. The district court and this court granted the following seven issues for a certificate of appealability ("COA"): (1) did Gillard's trial counsel labor under a conflict of interest; (2) should the trial court have conducted a hearing regarding trial counsel's conflict of interest; (3) was the trial court impartial and unbiased; (4) did the prosecution suppress evidence under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); (5) was Gillard's trial counsel ineffective during the mitigation phase of the trial; (6) was there

prosecutorial misconduct; and (7) did the cumulation of error at trial result in a violation of Gillard's constitutional rights?

II. STANDARD OF REVIEW

We review a district court's legal conclusions in a habeas proceeding *de novo* and its factual findings for clear error. *Lucas v. O'Dea*, 179 F.3d 412, 416 (6th Cir. 1999). Since Gillard filed his habeas petition after April 24, 1996, the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA") apply. *See Frazier v. Huffman*, 343 F.3d 780, 787 (6th Cir. 2003) (citing *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997)). Under AEDPA, a writ of habeas corpus should be denied unless the state court decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[,]" 28 U.S.C. § 2254(d)(1), or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

In *Williams v. Taylor*, 529 U.S. 362, 405, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000), the Supreme Court held that a state-court decision is "contrary to" Supreme Court precedent if (1) "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law[,]"or (2) "the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives" at a different result. A state court's decision is an "unreasonable application" under 28 U.S.C. § 2254(d)(1) if it "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular . . . case" or either unreasonably extends or unreasonably refuses to extend a legal principle from Supreme Court precedent to a new context. *Id.* at 407.

An objective standard is used to determine whether the state court's decision was reasonable. *Id.* at 409.

III. DISCUSSION

1. Gillard's trial counsel did not labor under a conflict of interest.

Gillard's counsel, Louis Martinez, had represented Gillard's brother, William, who had been a suspect in the two murders, before he represented John Gillard. According to Gillard, if Martinez had not represented William he would have argued during the trial that William was the murderer. The Warden argues that Gillard is not entitled to habeas relief because his trial counsel did not have an actual conflict of interest. We agree.

Gillard has a Sixth Amendment right to conflict-free representation by his counsel. *See Smith v. Anderson*, 689 F.2d 59, 62-63 (6th Cir. 1982). For Gillard to establish a violation of this right, he must satisfy two components. First, he must show that his counsel's performance was deficient, which "requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed [him] by the Sixth Amendment." *Wickline v. Mitchell*, 319 F.3d 813, 819 (6th Cir. 2003) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Second, he "must show that the deficient performance prejudiced the defense[,] . . . [which] requires showing that counsel's errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Id.* (quoting *Strickland*, 466 U.S. at 687). "To demonstrate that counsel's performance was deficient, [Gillard] 'must show that counsel's representation fell below an objective standard of reasonableness.'" *Roberts v. Carter*, 337 F.3d 609, 614

(6th Cir. 2003) (quoting *Strickland*, 466 U.S. at 688). To demonstrate prejudice, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Wickline*, 319 F.3d at 819 (quoting *Strickland*, 466 U.S. at 694). Our "[r]eview of counsel's performance is highly deferential and requires that [we] 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Id.* (quoting *Strickland*, 466 U.S. at 689). "Both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact entitled to de novo review." *Combs v. Coyle*, 205 F.3d 269, 278 (6th Cir. 2000).

Gillard can satisfy the above standard by showing that Martinez labored under an "actual conflict of interest." *See Strickland*, 466 U.S. at 692 (holding that proof of an actual conflict satisfies ineffectiveness prong, and creates a presumption of prejudice) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 348-50, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)); *see also United States v. Hall*, 200 F.3d 962, 965 (6th Cir. 2002). "An actual conflict . . . is a conflict of interest that adversely affects counsel's performance." *Mickens v. Taylor*, 535 U.S. 162, 172 n.5, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002). Under *Sullivan*, if Gillard establishes that Martinez's divided loyalties affected his representation, then prejudice is presumed and need not be proven. *See Sullivan*, 446 U.S. at 348. To that end, Gillard insists that "where counsel fails to pursue a strong and obvious defense, when pursuit of that defense would have inculpated counsel's other client, and where there is no countervailing benefit to [him] from foregoing that defense or other explanation for counsel's conduct, [it] amount[s] to evidence of disloyalty under any interpretation of *Sullivan*." *McFarland v. Yukins*, 356 F.3d 688, 707 (6th Cir. 2004).

Gillard's argument misses the mark because although Martinez had represented William during earlier pre-trial proceedings, the charges against William were dismissed (though he remained a suspect), and when William testified at Gillard's trial, Martinez was no longer representing him. Thus, Gillard fails to demonstrate that Martinez labored under any conflict of interest. *See Sullivan*, 446 U.S. at 348 ("[U]ntil a defendant shows that his counsel *actively* represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.") (italics added). Unlike *Sullivan*, which addressed joint or simultaneous representation, this case involves successive representation. "Successive representation occurs where defense counsel has previously represented a co-defendant or trial witness." *Moss v. United States*, 323 F.3d 445, 459 (6th Cir. 2003). Simultaneous and successive representation differ materially because in the latter, the attorney is no longer beholden to the former client. Because the Supreme Court has not held that successive representation gives rise to a presumption of prejudice, the *Sullivan* presumption does not control this habeas case. *See Mickens*, 535 U.S. at 174-76; *Moss*, 323 F.3d at 460-62; *Smith v. Hofbauer*, 312 F.3d 809, 815-18 (6th Cir. 2002).

Gillard also fails to prove prejudice. Although Gillard claims that Martinez missed several opportunities during the trial to shift the blame to William and portray him as the culprit, Gillard does not prove that Martinez's successive representation adversely affected his trial performance. The Ohio Supreme Court concluded that Martinez had an adequate strategy for refusing to project William as the murderer. *See Gillard*, 679 N.E.2d at 281-83. For example, William was not an alternative suspect because "evidence of [his] involvement was not inconsistent with [John Gillard's] guilt, *i.e.*, none of the evidence implicating William either negated

[John Gillard's] involvement or strengthened his alibi[,]" the prosecution argued that both brothers were involved in the murders, and Postlethwaite identified both brothers. *Id.* at 282. The Ohio Supreme Court then explained that "[i]f Martinez emphasized William's involvement in the murders, he would have conceded that the state's theory was in part correct." *Id.* at 283. If Martinez had blamed William for the murders, then he "risked substantiating Webb's testimony that William was 'taking the fall' for [John Gillard]. Likewise, taking the position that William fired shots outside the murder scene that night would bolster the general credibility of Postlethwaite, the state's sole identifying witness." *Id.* Gillard was not entitled to habeas relief on this claim.[1] Therefore, Gillard fails to show that the Ohio Supreme Court's decision was "contrary to, or an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States."

2. The trial court did not err in failing to conduct an evidentiary hearing at trial concerning defense counsel's alleged conflict of interest, and such purported conflict did not mandate an automatic reversal of Gillard's convictions.

Gillard argues that the trial court's failure to inquire as to Martinez's actual conflict of interest constitutes constitutional error and necessitates automatic reversal of his convictions. *See Wood v. Georgia*, 450 U.S. 261, 272 n.18, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981) (A reversal is mandated

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[1] Because Martinez's health precluded him from testifying in Gillard's post-conviction proceedings, we are unable to determine why he chose this strategy. However, it is immaterial because Martinez recognized during trial that there was no conflict, actual or otherwise.

"when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.'"). Because William was an unindicted co-conspirator in these crimes and a suspect in the murders, Gillard insists that Martinez's conflict was obvious and the trial court breached its duty to investigate the conflict regarding his representation. This claim fails.

Although a trial court is required to conduct an inquiry where it "knows or reasonably should know that a particular conflict exists," this obligation does not arise "when the trial court is aware of a vague, unspecified possibility of conflict, such as that which 'inheres in almost every instance of multiple representation[.]'" *Mickens*, 535 U.S. at 168-69 (citations omitted). Here, the trial court fully inquired into the possible conflict of interest presented by Martinez's successive representation, and the Ohio Supreme Court recognized only the possibility of a conflict of interest. *See Gillard*, 595 N.E.2d at 883. Martinez called William to testify during John Gillard's trial, to which the prosecution expressed reservations. After the prosecution specifically described the possible conflict of interest, Martinez did "not feel that there is a question of a conflict and [was] capable of advising [William] of his rights." The prosecution suggested that William be appointed separate counsel, and Martinez acknowledged that the trial court could appoint William another lawyer if there appeared to be a conflict. Thereafter, the trial court appointed separate counsel to advise William about his rights before he testified.

The trial court did all that was required of it, and the Ohio Supreme Court's conclusion that Martinez did not have an actual conflict was neither contrary to, nor an unreasonable application of, clearly established Federal law. Completely dissimilar to *Holloway v. Arkansas*, 435 U.S. 475, 488, 98 S.

Ct. 1173, 55 L. Ed. 2d 426 (1978), the *prosecution* timely objected to Martinez's successive representation, and Martinez chose to represent both brothers. Because defense counsel "is in the best position to determine if a conflict exists," the trial court could have properly deferred to Martinez's judgment that no conflict existed. *See Mickens*, 535 U.S. at 167-68. However, the trial court went further - instead of compelling Martinez to represent both brothers over the prosecution's objection, it appointed different counsel to advise William prior to his testimony. Moreover, as previously determined, this claim does not warrant habeas relief because there was no actual conflict of interest. *See id.* at 168-74. Since the trial court inquired into the purported conflict of interest, the automatic reversal rule was not implicated. *Cf. Holloway*, 435 U.S. at 488; *Riggs v. United States*, 209 F.3d 828, 831 n.1 (6th Cir. 2000).

3. The trial court was impartial and unbiased during Gillard's trial.

Gillard also maintains that the trial court judge, James Unger, was biased because he (1) had been a prosecutor at the time Gillard was investigated for a 1972 murder, (2) was the chief county prosecutor at the time the offenses at issue were committed and when a warrant was issued for Gillard's arrest, and (3) received prejudicial information concerning Gillard during an *ex parte* hearing.[2]

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[2] Gillard has procedurally defaulted the first of these three claims because he failed to raise it in his state appellate proceedings. *See Roberts v. Carter*, 337 F.3d 609, 613 (6th Cir. 2003), *cert. denied*, 540 U.S. 1151, 124 S. Ct. 1150, 157 L. Ed. 2d 1046 (2004). However, even if it were not procedurally defaulted, it still fails on the merits because Gillard was not prejudiced.

All three claims are meritless. First, Gillard was afforded a fair trial before an unbiased judge, pursuant to the Fourteenth Amendment. *See Bracy v. Gramley*, 520 U.S. 899, 904-05, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997). It is immaterial that Judge Unger was an assistant county prosecutor while Gillard was investigated for the 1972 murder. *See Jenkins v. Bordenkircher*, 611 F.2d 162, 166 (6th Cir. 1979) ("We have found no habeas corpus case which holds that it is a denial of due process for a judge to preside over a jury trial in a criminal case where the judge, as a prosecutor, had previously been involved in proceedings against the defendant in entirely unrelated cases.").

Second, Judge Unger was the chief county prosecutor at the time Gillard committed the murders in this case, but he left that position on January 3, 1985, in order to become a judge. A warrant for Gillard's arrest was issued on January 2, 1985, and Gillard was arrested on January 4. Gillard has completely failed to demonstrate that Judge Unger had any involvement in investigating the instant offenses during his final three days employed as the chief county prosecutor. *See Corbett v. Bordenkircher*, 615 F.2d 722, 723-24 (6th Cir. 1980); *Jenkins*, 611 F.2d at 166. Furthermore, Gillard has not pointed to any record evidence indicating that Judge Unger was biased. *See Corbett*, 615 F.2d at 723-24. He displayed no hostility or prejudgment toward Gillard during the trial.

Third, Judge Unger presided over a witness certification hearing in which the prosecution moved to delete Ronald Webb's name and address from the witness list or perpetuate his testimony because Gillard's brothers had threatened Webb and his family with physical harm if he testified against Gillard. *See* Ohio R. Crim. P. 16(B)(1)(e). Judge Unger granted the prosecution's motion to perpetuate Webb's testimony by deposition based on these allegations. During an

ex parte hearing, however, the prosecutor provided Judge Unger with the following information: Gillard acted as president of the Outlaws motorcycle gang and his brothers had threatened to harm Webb, Webb's family, and several others if they testified against Gillard in this case. Although the Ohio Supreme Court held that Judge Unger erred in refusing to recuse himself because of the particularly inflammatory nature of this information, such error was only harmless because of the overwhelming evidence of Gillard's guilt. *See Gillard*, 533 N.E.2d at 276-77. This conclusion has been specifically approved by this court in a similar capital case from Ohio. *See Esparza v. Mitchell*, 310 F.3d 414, 424 (6th Cir. 2002), *rev'd on other grounds*, 540 U.S. 12, 124 S. Ct. 7, 157 L. Ed. 2d 263 (2003). Further, Gillard points to nothing in the record suggesting that Judge Unger improperly considered, or was biased due to, the information he received during the *ex parte* hearing.

4. The prosecution did not suppress material and exculpatory evidence under *Brady*.

Gillard additionally claims that the prosecution failed to disclose relevant information and withheld exculpatory evidence from his counsel. *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Although the prosecution argued during trial that Postlethwaite immediately identified "Dirty John" as the shooter to the police, a police report that was not furnished to Martinez reveals that Postlethwaite told two individuals at the crime scene that "Gillard" was the murderer. This could refer to either John or William. Contrary to the prosecution's argument, no police report reflects that Postlethwaite identified John Gillard to the police officers at the crime scene. Nevertheless, a police officer testified during trial that Postlethwaite identified "Dirty John" Gillard as the shooter.

Further, while William was initially the principal suspect, the focus of the investigation turned to John Gillard after the police interviewed Postlethwaite (which they were unable to do initially due to his severe injuries).

"To establish a violation of *Brady*, [Gillard] has the burden of establishing that the prosecutor suppressed evidence; that such evidence was favorable to the defense; and that the suppressed evidence was material." *Carter v. Bell*, 218 F.3d 581, 601 (6th Cir. 2000) (citation omitted). "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)).

Although the first two *Brady* prongs are satisfied, none of the withheld evidence was material. Postlethwaite's statement that "Gillard" was the shooter is not exculpatory; rather, it would only have been somewhat useful for impeachment purposes and does not contradict any trial testimony. *See Gillard*, 1998 Ohio App. LEXIS 3088, 1998 WL 351442, at *3-4. Furthermore, Postlethwaite told the police on January 2, one day after the crimes occurred, that John Gillard shot him and Denise Maxwell. This is clearly *inculpatory* and of no assistance. *See id.* Gillard has not demonstrated "a reasonable probability that his conviction or sentence would have been different had these materials been disclosed." *See Strickler v. Greene*, 527 U.S. 263, 296, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). As already mentioned, there was overwhelming evidence of Gillard's guilt. For instance, Postlethwaite informed the police that he could tell the difference between John and William, saw William fire the

gun outside the house, and recognized "Dirty John" as the shooter. *See id.* at 273-75 & 291-96 (similar to case *sub judice*). Gillard failed to satisfy his burden.

5. Gillard's trial counsel was not ineffective during the mitigation phase of the trial.

According to Gillard, defense counsel was constitutionally ineffective during the sentencing phase of his trial because Martinez conducted no mitigation investigation, repeatedly told the jury that there were no mitigating factors, presented no mitigating evidence, and insinuated that the jury should impose the death penalty if it was sure of Gillard's guilt. Martinez exclusively relied upon residual doubt as the sole mitigating factor by arguing that Gillard was innocent; however, he never requested a residual doubt instruction from the trial court. Gillard claims that several mitigating factors existed, including provocation for the offense, absence of significant criminal history, intoxication, familial relationships, supportive children, and his educational and employment background.

The same *Strickland* standard applies here. *See Strickland*, 466 U.S. at 686. In *Wiggins v. Smith*, 539 U.S. 510, 522-23, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003), the Supreme Court held that a defense counsel's failure to investigate a defendant's background and present some mitigating evidence to the jury during the sentencing phase may constitute ineffective assistance of counsel. *See also Harries v. Bell*, 417 F.3d 631, 637 (6th Cir. 2005) (citing *Coleman v. Mitchell*, 268 F.3d 417, 449 (6th Cir. 2001)) ("Counsel's constitutional duty to investigate a defendant's background in preparation for the sentencing phase of a capital trial is 'well-established.'"). In considering whether Martinez exercised reasonable professional judgment, the crux is not whether he

"should have presented a mitigation case[;] [r]ather, we focus on whether the investigation supporting [his] decision not to introduce mitigating evidence of [Gillard's] background *was itself reasonable*." *Id.* (citing *Wiggins*, 539 U.S. at 522-23); *see Harries*, 417 F.3d at 638. When evaluating Martinez's performance, this court considers that quantum of evidence Martinez already knew, as well as "whether [this] known evidence would lead a reasonable attorney to investigate further." *See Wiggins*, 539 U.S. at 527. The question here is whether Martinez abandoned Gillard during the sentencing phase, thereby "making a fully informed decision with respect to sentencing strategy impossible." *Id.* at 527-28.

Although Gillard's observations are accurate, we cannot resolve that Martinez was deficient in failing to investigate and present mitigating evidence on Gillard's behalf. The Supreme Court has confirmed that residual doubts may benefit a capital defendant and are therefore appropriately considered as mitigating evidence during the sentencing phase of trial. *See Lockhart v. McCree*, 476 U.S. 162, 181, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986). More importantly, because much of Gillard's mitigating evidence was presented to the jury during the guilt phase, Martinez was not deficient for failing to revisit this same evidence during the sentencing phase. *See Bell v. Cone*, 535 U.S. 685, 699-700, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002). Gillard related mitigating evidence during his testimony, including his familial relationships.[3] Furthermore, keeping in mind that Martinez's

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[3] The Ohio Supreme Court determined that "residual doubt [was] not an important mitigating factor in this case" due to the "overwhelming and convincing" evidence of Gillard's guilt. *See Gillard*, 679 N.E.2d at 284. Contrary to Gillard's erroneous interpretation of this language, the Ohio Supreme Court indeed found that residual doubt was a mitigating factor, just not a

whole theory was an alibi/actual innocence, we must indulge that "'strong presumption' that [Martinez's] conduct [fell] within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission . . . was unreasonable in the harsh light of hindsight." *Cone*, 535 U.S. at 702 (citing *Strickland*, 466 U.S. at 689). Martinez employed a sound trial strategy - Gillard was somewhere other than the crime scene when the murders occurred and thus innocent - and an emphasis on mitigating evidence during the sentencing phase could have very well undermined this entire strategy.

Martinez's concession that there was no mitigating evidence does not denote a complete abandonment of Gillard or abdication of advocacy. *See Martin v. Mitchell*, 280 F.3d 594, 609-14 (6th Cir. 2002); *cf. Wiggins*, 539 U.S. at 527-28. Likewise, Martinez's suggestion that the jury should impose the death penalty because it would be consistent with the "mistake" it made when it adjudged Gillard guilty was not deficient. Martinez told the jury that its first mistake was convicting Gillard, but a second mistake "will be a fatal one" if it disbelieved Gillard's story in spite of "the possible ramifications of all of the evidence." Martinez asked the jury "to impose a penalty other than the death penalty at this time based on the proposition that John Gillard was not there." In addition, Martinez's suggestion could have been an attempt to bolster his credibility with the jury. Gillard's entire defense rested on his alibi that he was with his girlfriend when the murders occurred and Martinez elected to pursue that theory until the very end. Again, all of this was sound trial strategy.

Given that Gillard has not pointed to any additional

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convincing one.

mitigating evidence that should have been discovered but was not and that the jury heard all mitigating evidence that Gillard wished to present, he cannot be heard to claim that his defense counsel was deficient. This is so despite Martinez's choice not to label these facts as mitigating evidence to the jury. *See Workman v. Bell*, 178 F.3d 759, 770-71 (6th Cir. 1998) (Although a failure "to present any mitigating evidence is disfavored[,] . . . it is clear that [capital defendant's] trial counsel investigated his background and character but determined for tactical reasons not to present such information to the jury[]" during the sentencing phase.).

Nevertheless, even assuming *arguendo* that Martinez's performance was deficient, Gillard is not entitled to habeas relief because he was not prejudiced. "For [Martinez's] objectively unreasonable performance to constitute ineffective assistance of counsel, *Strickland* requires [Gillard] to prove prejudice 'satisfied by showing a reasonable probability that but for such performance the trial outcome would have been different.'" *Harries*, 417 F.3d at 639 (quoting *Coleman*, 268 F.3d at 452). "In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence." *Id.* at 639 (quoting *Wiggins*, 539 U.S. at 534). Gillard need only show that one juror would have reached a different result to establish prejudice. *See Hamblin v. Mitchell*, 354 F.3d 482, 493 (6th Cir. 2003), *cert. denied*, 543 U.S. 925, 125 S. Ct. 344, 160 L. Ed. 2d 223 (2004).

Under the facts of this case, defense counsel's failure to introduce any other mitigating evidence during the sentencing phase and his admission to the jury that no mitigating evidence existed do not constitute ineffective assistance of counsel. The jury was privy to this mitigating evidence during the trial's guilt phase and Martinez was not obligated to reintroduce it. *See Cone*, 535 U.S. at 699-700. Even if

Martinez had specifically delineated all mitigating evidence during the sentencing phase, it was still insufficient to create a "reasonable probability that at least one juror would have struck a different balance." *Hamblin*, 354 F.3d at 493 (quoting *Wiggins*, 539 U.S. at 537). The evidence Gillard offered to mitigate his culpability included the absence of a significant criminal history, his intoxication at the time of the offenses, his familial relationships, and his educational and solid employment history. None of this rises anywhere near the level of mitigating evidence required by this court to establish prejudice or the reasonable probability that the trial's outcome would have been different. *See, e.g., Harries*, 417 F.3d at 639-40 (defense counsel's investigation would have revealed petitioner's traumatic childhood marked by severe physical abuse, violent family, constant incarceration, suicide attempt, brain damage, and social disorder, if he had investigated); *Hamblin*, 354 F.3d at 490-91 (defense counsel failed to discover evidence of abject poverty, physical abuse, family violence, neglect, instability, and lack of education); *Coleman*, 268 F.3d at 450-51 (defense counsel did not investigate petitioner's physical and psychological abuse, exposure to group sex, bestiality, and pedophilia, abandonment, and personality disorder). Gillard's evidence is completely dissimilar to any of the foregoing and is insufficient to tip the scale in his favor.

The Ohio Supreme Court's decision is not contrary to, nor an unreasonable application of, clearly established Federal law, and it did not apply *Strickland* to these facts in an objectively unreasonable manner. *See Gillard*, 533 N.E.2d at 281.

6. The prosecutorial improprieties during Gillard's trial did not violate his constitutional rights.

Gillard lastly insists that prosecutorial misconduct so infected his trial with unfairness as to result in a denial of due process. According to Gillard, the prosecution unfairly attacked his character, argued prejudicial matters outside the record, offered expressions of personal belief, and made inflammatory arguments designed to enrage and unfairly prejudice the jury. During trial, the prosecution occasionally referred to Gillard as "Dirty John," asked Gillard on cross-examination whether he was called "Dirty John" because he would "shoot an innocent sleeping woman on a couch," questioned his membership in several motorcycle gangs, suggested that William had attempted to "fix" the trial, stated that Gillard was a "lie," "a fraud," and "a con" because he wore a suit during the trial, and displayed photographs of the crime scene during closing argument.

On habeas review, this court reviews claims of prosecutorial misconduct deferentially. *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986). To be cognizable, the misconduct must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)). Even if the prosecution's conduct was improper or even "universally condemned," *id.*, this court can only reverse if the statements were so flagrant as to render the entire trial fundamentally unfair. If we find a statement improper, four factors are considered in determining whether the impropriety is flagrant: "(1) the likelihood that the remarks would mislead the jury or prejudice the accused, (2) whether the remarks were isolated or extensive, (3) whether the remarks were deliberately or accidentally presented to the

jury, and (4) whether other evidence against the defendant was substantial." *Bowling v. Parker*, 344 F.3d 487, 512-13 (6th Cir. 2003). Nevertheless, considering a prosecutor's wide latitude in submitting arguments to a jury, we recognize "that reversal of a conviction should not be ordered when a prosecutor's behavior, even though inappropriate, has not resulted in prejudicial error." *Sizemore v. Fletcher*, 921 F.2d 667, 670 (6th Cir. 1990).

Considering each of the four aforementioned factors, we conclude that none of Gillard's examples of alleged prosecutorial misconduct rises to such a level as to justify habeas relief. Initially, references to Gillard as "Dirty John" were entirely proper because that was his nickname, which was relevant because Postlethwaite had identified "Dirty John" as the shooter. Any remarks as to his nickname did not necessarily mislead or prejudice the jury. The prosecution's inquiry regarding Gillard's motorcycle gang affiliation was also proper because he acquired the nickname "Dirty John" while working on motorcycles during his youth. The information concerning Gillard's affiliation with motorcycle gangs was elicited during cross-examination and went to his credibility. Gillard does not submit that the prosecutor lacked a good-faith basis for questioning him regarding his motorcycle gang membership. *See Gillard*, 533 N.E.2d at 277-78. Similarly, any reference to Gillard's clothing would have only a slight tendency to divert the jury from the actual issues in the trial. *See Fussell v. Morris*, 884 F.2d 579, 1989 WL 100857, at *4 (6th Cir. 1989) (table).

Next, the prosecution's remarks were isolated since they occurred primarily during closing argument at the conclusion of a lengthy six-week trial. *See Millender v. Adams*, 376 F.3d 520, 528-29 (6th Cir. 2004); *United States v. Solivan*, 937 F.2d 1146, 1155 (6th Cir. 1991) (prosecutorial misconduct

was "isolated to one portion of the trial, closing argument"). In addition, the trial court employed limiting instructions to rectify many of the improper remarks and explained to the jury that counsel's arguments were not evidence. *See Roe v. Baker*, 316 F.3d 557, 566 (6th Cir. 2002). These isolated remarks did not result in a denial of Gillard's right to due process. *See Millender*, 376 F.3d at 528-29.

Further, although it appears that the prosecution deliberately made the complained-of remarks, this action did not render Gillard's trial constitutionally unfair. Rather, the prosecution was only summarizing the evidence (and did not misstate it), Gillard's testimony, and the trial's events for the jury. *See Hutchison v. Bell*, 303 F.3d 720, 750-51 (6th Cir. 2002); *Hill v. Brigano*, 199 F.3d 833, 847-48 (6th Cir. 1999) (no misconduct when prosecution only commented on the evidence during closing argument).

Finally, as the Ohio Supreme Court observed, there was overwhelming evidence of Gillard's guilt. *See Bates v. Bell*, 402 F.3d 635, 648-49 (6th Cir. 2005). Despite the prosecution's exhibition of the crime scene photographs during its closing argument, Gillard was identified by an eyewitness (who knew him) as the shooter, confessed to Ronald Webb, "I pulled the trigger, my brother is taking the fall," fled after the crimes were committed, changed his appearance, gave a false name to the arresting police officers, and had the murder weapon two weeks before the crimes occurred. The prosecution's statements and actions here were not "so egregious as to render the trial fundamentally unfair." *Angel v. Overberg*, 682 F.2d 605, 608 (6th Cir. 1982) (*en banc*).

7. The cumulation of errors at Gillard's trial does not warrant habeas relief.

The Warden also contends that the district court improperly granted habeas relief based upon the cumulative effect of the errors during Gillard's trial. While we have recognized that "[e]rrors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair," *Walker v. Engle*, 703 F.2d 959, 963 (6th Cir. 1983), the "Supreme Court has not held that distinct constitutional *claims* can be cumulated to grant habeas relief," *Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir. 2002) (italics added). Thus, the Ohio courts' determination is not contrary to, or an unreasonable application of, clearly established Federal law as determined by the United State Supreme Court because Gillard's individual assignments of error would not support habeas relief, and the cumulative effect thereof is likewise insufficient. *See Scott v. Elo*, 302 F.3d 598, 607 (6th Cir. 2002) (identical to case at bar).

IV. CONCLUSION

For the foregoing reasons, we **AFFIRM IN PART** and **REVERSE IN PART** the district court's order. We **REVERSE** the district court's grant of Gillard's writ regarding ineffective assistance of counsel due to a conflict of interest and cumulative error, and **AFFIRM** the denial of the remainder of his writ of habeas corpus.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 03-4261: 03-4322

[Filed April 26, 2006]

JOHN GILLARD,	)
Petitioner-Appellee/Cross-Appellant,	)
	)
v.	)
	)
BETTY MITCHELL, Warden,	)
Respondent-Appellant/Cross-Appellee.	)
	)

On Appeal from the Untied States District Court
fro the Northern District of Ohio at Akron.

Before: SILER, DAUGHTREY, and SUTTON, Circuit Judges.

JUDGMENT

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the district court's order is AFFIRMED IN PART and REVERSED IN PART.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

CASE NO. 99 CV 2996

[Filed August 27, 2003]

JOHN GILLARD Petitioner,	)
v.	)
BETTY MITCHELL, Warden Respondent.	)

JUDGE PETER C. ECONOMUS

MEMORANDUM OPINION AND ORDER

This matter is before the Court on John Gillard's Petition under 28 U.S.C. § 2254 for Writ Of Habeas Corpus By A Person In State Custody (ECF # 2; later amended ECF # 29) (the "Petition."). Gillard alleges seventeen grounds for relief in his amended Petition and requests a heating "at which proof may be offered concerning the allegations of this

petition."[1] Also before the Court are Respondent's Return of Writ (ECF #94) ("ROW") and Petitioner's First Amended Traverse To Respondent's Return Of Writ (ECF # 95) ("Traverse"). Moreover, the Court heard oral arguments on this matter at a hearing conducted on July 7, 2003.

For the reasons which follow, the petition for a writ of habeas corpus is **GRANTED in part** and **DENIED in part.**

I. INTRODUCTION

Appellant, John Gillard, appeals his conviction and sentence of death for the aggravated murders (committed with prior calculation and design and felony murder) of Denise Maxwell and Leroy Ensign and for the attempted aggravated murder (course of conduct involving the purposeful killing of two or more people and aggravated burglary) of Ronnie Postlethwaite.

II. FACTUAL BACKGROUND

The facts as stated by the Ohio Supreme Court are as follows:

> On December 31, 1984, Timothy Hendricks held a New Year's Eve party in his home at 213 Kennet Court, N.W., Canton. Among the guests were Ronnie Postlethwaite, Denise Maxwell, Leroy Ensign, and defendant-appellee's brother William Gillard. During

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[1] References to the trial transcript and appendix in this decision will follow the following format: (x T. y) and (x A. y), where x is the relevant volume number of the trial transcript ("T.") or appendix ("A.") and y is the relevant page number within volume x.

the party, there was a fight between Ensign and Gillard. After Hendricks broke up the fight, William Gillard left.

The party ended between 3:00 and 4:00 a.m., January 1. Seven guests stayed the night, including Ensign, Postlethwaite, and Maxwell.

Postlethwaite and Hendricks were both awakened by a gunshot outside. Hendricks went back to sleep. Postlethwaite got up and looked outside; he saw William Gillard fire a second shot into the air from a handgun. Postlethwaite tried unsuccessfully to wake Ensign.

The next thing Postlethwaite recalled was hearing the back door slammed open. He heard heavy steps "[l]ike horses trampling" and then a shot was fired.

Someone grabbed Postlethwaite's hair and pulled his head back. His assailant put a gun against his temple, shot him, and threw him to the floor. Postlethwaite then saw the gunman aim at Denise Maxwell's head and fire, killing her. Postlethwaite recognized the gunman as John Gillard.

Larry Beck, a neighbor, heard two gunshots between 3:00 and 3:30a.m. At 4:15, he heard "at least two people" going towards 213 Kennet Court. About twelve minutes later, he heard more gunshots and heard two men running away from 213 Kennet Court.

At approximately 4:50 a.m., Canton police officer Sheldon Godshall arrived. Godshall asked Postlethwaite who had shot him. Postlethwaite said,

"Dirty John." Godshall asked, "Dirty John who?" and Postlethwaite replied, "Dirty John Gillard." Another officer found Leroy Ensign's body lying near the entrance of the house.

On January 4, Ronald Webb, his wife, and Donald Gorby were in the kitchen of Webb's downstairs apartment in a two-family house in Wellsburg, West Virginia, when John Gillard came to the door. Webb testified that Gorby introduced Gillard to him as "Butch Johnson." At Gillard's request, Mrs. Webb cut Gillard's hair.

While Gillard was there, Milton Smith, who lived upstairs with Gorby, entered the kitchen, saw Gillard, and said: "Jesus Christ, I didn't recognize you without the beard, Dirty John." Smith and Gillard went upstairs. They eventually came back down to the kitchen, where Smith told Webb "* * * to keep him there and party with him and don't let him go nowhere, don't take him outside that house, don't take him to no bars." Smith then left.

As they talked, Webb mentioned to Gillard that he had "read in the paper where his brother was in jail for shooting some people in Canton." Gillard replied: "I pulled the trigger, my brother is taking the fall."

Later that day, Webb had a dispute with Gillard and Gorby. Webb threatened to go "to the law," whereupon Gillard said, "I got to get out of here." Webb then reported Gillard's presence to the Brooke County, West Virginia, sheriff's office. As a result, sheriff's deputies and Wellsburg police went to the Webb residence and arrested Gillard. Gillard

identified himself to the arresting officers as "Butch Johnson."

John Gillard was indicted for the aggravated murders of Denise Maxwell and Leroy Ensign, and for the attempted aggravated murder of Ronnie Postlethwaite. In each of these three cases, two counts were returned: one charging that the offense was committed with prior calculation and design, R.C. 2903.01(A), and one charging felony murder, R.C. 2903.01(B). Each count of aggravated murder carried two death specifications: one charging a course of conduct involving the purposeful killing of two or more people, R.C. 2929.04(A)(5); and one charging murder coupled with aggravated burglary, R.C. 2929.04(A)(7). A seventh count charged Gillard with aggravated burglary, R.C. 2911.11.

Gillard's alibi defense consisted of testimony that he and Jerri Oney had been at the home of Tracy and Melissa Price between 10:30 p.m., December 31, and 4:30 a.m., January 1, and had gone directly from there to Oney's house. Oney and the Prices corroborated this account. Gillard admitted going to Wellsburg and meeting Webb, but denied introducing himself as "Butch Johnson" and telling Webb that he had been "the trigger man." Gillard also denied that Mrs. Webb had cut his hair.

Gillard was convicted of all charges and specifications. The jury recommended that Gillard be sentenced to death on both counts of Leroy Ensign's murder and both counts of Denise Maxwell's murder. The trial judge followed the recommendation and sentenced Gillard to death.

State v. Gillard, 533 N.E.2d 272, 274-275 (Ohio 1988).

III. PROCEDURAL HISTORY

Gillard seeks review of his jury conviction for aggravated murder, as well his sentence of death. In 1987, the Court of Appeals for Stark County reversed his conviction and sentence. *State v. Gillard*, 1987 WL 5768 (Ohio 5th App. Dist. 1987), *rev'd*, 533 N.E.2d 272 (1988). The state sought and obtained the Ohio Supreme Court's leave to appeal. The court sustained the appeal and remanded the case to the court of appeals for independent review of the death sentence. *Id.*

On remand, the court of appeals affirmed the death sentence. *State v. Gillard*, 1990 WL 94632 (Ohio App. 5th Dist 1990). Gillard appealed that judgment to the Ohio Supreme Court. In the process, he added new claims, one of which alleged that his trial counsel had labored under an impermissible conflict of interest. The Ohio Supreme Court remanded to the Stark County Court of Common Pleas for determination of whether or not a conflict existed. After determining that no conflict existed, the trial court returned the cause to the Supreme Court. *State v. Gillard*, 595 N.E.2d 878 (1992) ("*Gillard II*").

The Supreme Court affirmed both the conviction and the death sentence. *State v. Gillard*, 679 N.E.2d 276, 280-283 (Ohio 1997). In so doing, the court conducted an independent review pursuant to Ohio Rev. Code Ann. § 2929.05(A) (Anderson 1996). *Gillard*, 679 N.E.2d at 283-285. In that proceeding, Gillard again attempted to raise new issues, which the Court declined to consider because they were beyond the scope of its remand. Additionally, the court held that those claims were barred by *res judicata* because Gillard

had failed to raise them in his 1988 cross-appeal. *Id.* at 279-280.

On July 7, 1997, Gillard filed in the court of appeals an application to reopen his direct appeal under Ohio R. App.P. 26(B). He alleged that his appellate counsel had rendered ineffective assistance before the court of appeals by failing to raise certain issues during his 1987 appeal. When the state failed to respond, the court of appeals granted the application and reinstated Gillard's direct appeal. On the reinstated appeal, the court of appeals reaffirmed the judgment of the trial court, *State v. Gillard*, Stark App. No. CA-6701 (1998) (unreported). Gillard appealed the court of appeals' judgment, and the Ohio Supreme Court dismissed the appeal.

On December 7, 1999, Gillard filed his first Petition for Writ of Habeas Corpus (ECF # 2; amended June 15, 2001, ECF #29). In his amended petition, Gillard identifies seventeen claims of alleged constitutional violation:

1. John Gillard's convictions and sentences are invalid because his lead trial counsel labored under a conflict of interest because he represented both John and William Gillard who were leading suspects in the prosecutor's ongoing investigation. U.S. Const. amends. V, VI, VII, and XIV.

2. John Gillard's convictions and sentences are infirm because the trial court failed to hold a hearing regarding the conflict under which his trial counsel labored because trial counsel represented both John and William Gillard. U.S. Const. amends. V, VI, VII, and XIV.

3. John Gillard's convictions and sentences are constitutionally infirm because the trial judge assigned to his case was not found impartial. U.S. Const amends. V, VI, VII, and XIV.

4. The state of Ohio knowingly presented false testimony and argument to the jury. U.S. Const amends. V, VI, VII, and XIV.

5. Mr. Gillard's convictions and sentences are constitutionally infirm because the prosecution suppressed material, exculpatory, and impeachment evidence. U.S. Const. amends. V, VI, VII, and XIV.

6. The prosecutor's misconduct during the pre-trial, trial, and mitigation phases of Petitioner's capital trial violated his rights. U.S. Const amends. V, VI, VII, and XIV.

7. John Gillard's convictions and sentences are constitutionally infirm because the prosecutor adduced testimony that Mr. Gillard had refused to make a statement after being advised by the arresting officer of his Miranda rights and that Mr. Gillard, without waiving his rights, subsequently made a statement to the interrogating officer. U.S. Const amends. V, VI, and XIV.

8. John Gillard's convictions and sentences are constitutionally infirm because his trial counsel failed to provide reasonably effective assistance. U.S. Const. amends. V, VI, VII, and XIV.

9. John Gillard's convictions and sentences are constitutionally infirm because his trial counsel

failed to provide reasonably effective assistance in the mitigation phase. U.S. Const amends. V, VI, VII, and XIV.

10. John Gillard's convictions and sentences are constitutionally infirm because the trial court employed excessive security in such a manner as to violate John Gillard's right to a fair trial. U.S. Const. amends. V, VI, VII, and XIV.

11. John Gillard's death sentence as to Leroy Ensign is constitutionally infirm because the trial court instructed the jury that they could convict Mr. Gillard of the felony murder capital specification if they found that he aided and abetted in the aggravated murder. U.S. Const. amends. V, VI, VII, and XIV.

12. John Gillard's convictions and death sentences are constitutionally infirm because the trial court failed to properly instruct the jury during the trial phase. U.S. Const. amends. V, VI, VII, and XIV.

13. Mr. Gillard's death sentences are constitutionally infirm because the trial court failed to properly instruct the jury during the mitigation hearing.

14. John Gillard's convictions and sentences are constitutionally infirm because he was not afforded the effective assistance on appeal. U.S. Const amends. V, VI, VII, and XIV.

15. John Gillard's convictions and death sentences are invalid due to the state appellate court's failure to conduct a fair and adequate appellate review of John

Gillard's death sentence. U.S. Const. amends. V, VI, VII, and XIV.

16. John Gillard's convictions and death sentences are constitutionally infirm because Ohio's capital punishment system operates in an arbitrary and capricious manner. U.S. Const amends. V, VI, VII, and XIV.

17. Mr. Gillard's convictions and death sentences are invalid under the Federal constitutional guarantees of due process, equal protection, the effective assistance of counsel, a fair tribunal, an impartial jury, and a reliable sentence due to the cumulative errors in the misconduct by the state officials and witnesses, and the systematic deprivation of his right to the effective assistance of counsel. U.S. Const. amends. V, VI, VII, and XIV.

IV. INITIAL CONSIDERATIONS

A. AEDPA Applies To The Petition

As a preliminary matter, the Court notes that Gillard filed his petition on December 7, 1999, well after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Thus, AEDPA governs our review. *See Williams v. Coyle*, 167 F.3d 1036, 1037 (6th Cir. 1999).

B. Standard of Habeas Review Under AEDPA

AEDPA "requires heightened respect for state court factual and legal determinations." *Herbert v. Billy*, 160 F.3d 1131, 1134 (6th Cir. 1998). Under AEDPA, federal habeas courts must accord complete deference to state court findings of fact, consistent with the presumption of correctness codified in 28 U.S.C. § 2254(e)(1). *See Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir. 1998). An applicant seeking a writ pursuant to § 2254 may rebut this presumption of correctness only with clear and convincing evidence. § 2254(e).

Furthermore, a petition for a writ of habeas corpus on behalf of a person in custody by the judgment of a state court shall not be granted with respect to any claim adjudicated on the merits in state court proceedings unless the applicant shows that the adjudication of the claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. *See* 28 U.S.C. § 2254(d) (1) and (2) (as amended by AEDPA); *Williams v. Taylor*, 529 U.S. 362,404-405 (2000).

A state court adjudication is "contrary to" Supreme Court precedent under § 2254(d)(1), "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law," or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent" and arrives at a different result. *Williams*, 529 U.S. at 404-05. A state court adjudication involves "an unreasonable application of' Supreme Court precedent under § 2254(d)(2), "if the state court identifies the correct

governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular ... case," or if the court unreasonably refuses to extend, or unreasonably extends, existing legal principles from the Court's precedents to a new context. *Id.* at 407; *see also Smith v. Hofbauer*, 312 F.3d 809, 813 (6th Cir. 2002).

Federal courts may entertain a state prisoner's petition for habeas relief only if the prisoner's confinement violates the Constitution, laws, or treaties of the United States. *See* 28 U.S.C. § 2254(a) (1994). A violation of state law is not cognizable in a Federal habeas proceeding unless the violation is of constitutional magnitude. *See, e.g., Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a Federal habeas court to reexamine state-court determinations on state-law questions"); *Pulley v. Harris*, 465 U.S. 37, 41 (1984). Thus, general improprieties occurring in state court proceedings are cognizable only if they resulted in fundamental unfairness and consequently violated the habeas petitioner's Fourteenth Amendment right to due process. Relief from violations of federal law will be granted only if the violation rises to the level of a "fundamental defect which inherently results in a complete miscarriage of justice." *Reed v. Farley*, 512 U.S. 339, 340 (1994) (*quoting Hill v. U.S.*, 368 U.S. 424, 428 (1962)).

Federal courts apply a different harmless error standard of review in habeas proceedings than that which they apply in direct appellate review. Thus, for purposes of federal habeas review, a constitutional error that implicates trial procedures must be considered harmless unless it had a "substantial and injurious effect or influence in determining [the] jury's verdict" *Brecht v. Abramson*, 507 U.S. 619, 637 (1993). The Sixth Circuit has held that the *Brecht* standard applies in habeas cases even where the federal habeas court is the first

to conduct harmless error review. *See Gilliam v. Mitchell*, 179 F.3d 990, 995 (6th Cir. 1999).

C. Procedural Default

In this case, Respondent asserts that Gillard's claims 3-5 and 8-14 are procedurally defaulted because Gillard failed to raise these claims in state court. However, rather than undertake the complicated and resource-consuming task of determining (1) which of Petitioner's claims have been procedurally defaulted, and (2) which procedurally defaulted claims, if any, may nonetheless be considered on the merits pursuant to *Coleman v. Thompson*, 501 U.S. 722, 751 (1991), the Court chooses to bypass the procedural default analysis in this case. Therefore, the Court will decide the merits of each of the Petitioner's grounds for relief asserted in his Petition to the extent the Court is permitted to do so under 28 U.S.C. § 2254 (d) (as amended by AEDPA). As the Honorable John M. Manos, Senior United States District Judge, has astutely reasoned:

> Not surprisingly, [the Petitioner] and the State offer differing interpretations of Ohio law and disagree over the existence or non-existence of support for each prong of the procedural default analysis. [The Petitioner] also argues that even if any of his grounds for relief have been procedurally defaulted, such default resulted from the ineffective assistance of counsel which thereby establishes "cause." *See Murray v. Carrier*, 477 U.S. 478, 488 (1986) (ineffective assistance of counsel is "cause" for procedural default).
>
> The analysis is further complicated by the narrow (but important) exception to the cause-and-prejudice

standard. *See*, *e.g.*, *Coleman*, 501 U.S. at 750. Even assuming that a claim has been procedurally defaulted and the petitioner has not established "cause" and "prejudice" for such default, a court must nonetheless review the merits of the petition to protect against a "fundamental miscarriage of justice." *See Murray*, 477 U.S. at 496 ("[I]n an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a Federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default"); *Sawyer v. Whitley*, 505 U.S. 333, 350 (1992) (where a habeas petitioner establishes that but for constitutional error at the sentencing hearing no reasonable juror would have found him eligible for the death penalty, a Federal court may grant the writ even in the absence of a showing of cause for procedural default).

To protect against "fundamental miscarriage of justice, *see Coleman*, 501 U.S. at 750, the Court has reviewed the petition and finds that all grounds for relief lack merit. Therefore, rather than undertake an extensive analysis of Ohio law on the issue of procedural default, the Court will simply address each ground on the merits.

Williams v. Coyle, Case No. 1:96CV793 (N.D. Ohio April 2, 1998) at 29-30.

Likewise, this Court will consider the Petitioner's claims on their merits.

D. Gillard is not entitled to an evidentiary hearing.

On September 27, 2002, this Court issued a Memorandum Opinion and Order (ECF #103) denying Gillard's motion for an evidentiary hearing. The Court appropriately applied the post-AEDPA standard of review in resolving that motion, and concluded that Gillard's contention that he is entitled to an evidentiary hearing lacked merit.

28 U.S.C. § 2254(e)(2) requires that:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the [habeas] court shall not hold an evidentiary hearing on the claim unless the applicant shows that--
>
> (A) the claim relies on--
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

In *M. W. Williams v. Taylor*, 529 U.S. 420 (2000), the Supreme Court explained the analysis federal habeas courts must apply to determine whether an evidentiary hearing is appropriate. The Court held that "[u]nder the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or

some greater fault, attributable to the prisoner or the prisoner's counsel." *Id.* at 432. The Court reasoned, "[t]he question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts [to develop those facts]. The purpose of the fault component of 'failed' is to ensure the prisoner undertakes his own diligent search for evidence.[2] *Id.* at 435. To satisfy the diligence requirement, the Court required that a petitioner "at a minimum [must] seek an evidentiary hearing in state court in the manner prescribed by state law." *Id.*

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[2] The diligence requirement preserves comity between the state and Federal courts. "Comity... dictates that when a prisoner alleges that his continued confinement for a state court conviction violates Federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief." *M.W. Williams*, 529 U.S. at 437 (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999)). The Court continued:

> For state courts to have their rightful opportunity to adjudicate Federal rights, the prisoner must be diligent in developing the record and presenting if possible, all claims of constitutional error. If the prisoner fails to do so, himself or herself contributing to the absence of a full and fair adjudication in state court, § 2254(e)(2) prohibits an evidentiary hearing to develop the relevant claims in Federal court, unless the statute's other stringent requirements are met. Federal courts sitting in habeas are not an alternative forum for laying facts and issues which a prisoner made insufficient effort to pursue in state proceedings. Yet comity is not served by saying a prisoner "has failed to develop the factual basis of a claim" where he was unable to develop his claim in state court despite diligent effort. In that circumstance, an evidentiary hearing is not barred by § 2254(e)(2).

Id.

Nevertheless, as the Fifth Circuit noted in *McDonald v. Johnson*, 139 F.3d 1056 (5th Cir. 1998), "even if [a petitioner's] claim is not precluded by § 2254(e)(2), that does not mean he is entitled to an evidentiary hearing - only that he *may* be." *Id.* at 1059-60 (emphasis in original). The Fifth Circuit reasoned that "Consistent with AEDPA's goal of streamlining the habeas process, § 2254(e)(2) specifies the situations where evidentiary hearings are *allowed,* not where they are *required.*" *Id.* at 1060. (emphasis in original). The determination as to whether an evidentiary heating is warranted "is committed to the district court's discretion pursuant to Rule 8 of the Rules Governing § 2254 Cases." *Id.* Finally, "[i]n determining whether an evidentiary heating is proper, the district court may expand the record and consider affidavits, exhibits, or other materials that cast fight on the merits of the petition." *Id. See also Cardwell v. Greene*, 152 F.3d 331, 338-339 (4th Cir. 1998) (where the district court expands the record to include documentary evidence "the need for an evidentiary hearing may be obviated.").

The Court has laboriously reviewed the entire record of this case, including substantial additional evidence submitted and entered before this Court. Furthermore, the Court heard oral arguments that, in addition to highlighting the most relevant portions of the record, demonstrated its comprehensiveness. On these bases, the Court concludes that no evidentiary hearing is warranted.[3]

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[3] Petitioner's trial counsel, the target of the conflict of interest claim addressed *infra*, is deceased. Were trial counsel still available to attend an evidentiary hearing, the Counsel would have granted one on the first ground of the petition.

V. ANALYSIS OF PETITIONER'S CLAIMS

A. Counsel's Conflict of Interest

1. John Gillard's convictions and sentences are invalid because his lead trial counsel labored under a conflict of interest because while he represented John Gillard, he also represented William Gillard, a leading suspect in the prosecutor's ongoing investigation. U.S. Const. amends. V, VI, VII, and XIV.

Gillard argues that he received ineffective assistance of counsel because his lead counsel, Mr. Martinez, labored under a conflict of interest.[4] Gillard points out that, at the same time Martinez represented John Gillard, he also represented John's brother, William, another suspect under investigation for the murders of Ensign and Maxwell.

"Criminal defendants enjoy a Sixth Amendment right to conflict-free representation by their counsel." *U.S. v. Salcido*, 29 Fed. Appx. 216 (6th Cir. 2002); *see also Wood v. Georgia*, 450 U.S. 261, 271 (1981) ("Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest"); *Smith v. Anderson*, 689 F.2d 59,62-63 (6th Cir. 1982) (affirming grant of habeas writ because trial counsel labored under conflict). Whether a defendant's representation violates the Sixth Amendment right to effective assistance of counsel is a mixed question of law and fact reviewed de novo. *Cuyler v. Sullivan*, 446 U.S. 335, 342

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[4] Respondent does not assert that this claim is procedurally defaulted.

(1980); *U.S. V. Hopkins*, 43 F.3d 1116, 1118 (6th Cir. 1995).

A petitioner is generally required to demonstrate prejudice to prevail on a claim of ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). However, when a petitioner's counsel labors under an actual conflict of interest, prejudice is presumed. *Id.* at 692; *U.S. v. Hall*, 200 F.3d 962, 965 (6th Cir. 2000). Thus, a defendant claiming he was denied his right to conflict-free counsel based on an actual conflict need not establish a reasonable probability that, but for the conflict or a deficiency in counsel's performance caused by the conflict, the outcome of the trial would have been different. Rather, he need only demonstrate an actual conflict of interest that adversely affected his counsel's performance.[5] *See Cuyler*, 446 U.S. at 348; *Hall*, 200 F.3d at 965.

"An attorney has an actual, as opposed to a potential, conflict of interest when, during the course of the representation, the attorney's and defendant's interests diverge with respect to a material factual or legal issue." *Winkler v. Keane*, 7 F.3d 304, 307 (2nd Cir. 1993) (internal quotation marks omitted); *Holloway v. Arkansas*, 435 U.S. 475, 478-80 (1978). The Sixth Circuit has stated that:

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[5] It bears notation that the latter part of this statement is contained within the scope of the former:

> [T]he [*Cuyler*] standard is not properly read as requiting inquiry into actual conflict as something separate and apart from adverse effect. An "actual conflict," for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance.

Mickens v. Taylor, 535 U.S. 162, 122 S.Ct. 1237, 1244 (2002).

> In order to establish a conflict of interest, defendant must point to "specific instances in the record to suggest an actual conflict or impairment of [his] interests." ... [Defendant] must demonstrate that the attorney "made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other. If he did not make such a choice, the conflict remained hypothetical." ...There is no violation where the conflict is "irrelevant or merely hypothetical"; there must be an "actual significant conflict."

Hopkins, 43 F.3d at 1119 (quoting *Thomas v. Foltz*, 818 F.2d 476, 481 (6th Cir.), *cert. denied*, 484 U.S. 870 (1987) (citation omitted)).

In accordance with AEDPA, this Court reviews the final decision of the state courts to determine whether it is contrary to or an unreasonable application of federal law as determined by the Supreme Court. Announcing the final decision of the Ohio court system, the Ohio Supreme Court ruled as follows:

> Appellant contends that his trial counsel, Louis Martinez, labored under an actual conflict of interest because Martinez also represented William A. Gillard, appellant's brother. Martinez represented William when he pled no contest to and was found guilty of a misdemeanor for illegally discharging a firearm at the crime scene immediately prior to the murders. William was also under investigation [for his involvement in the murders] by the grand jury during [gillard's] trial . . . .
>
> At our direction, the trial court conducted a hearing to determine whether Martinez represented appellant

under the cloud of an actual conflict of interest. Appellant presented testimony from three witnesses: Craig Chessler, co-counsel for appellant at trial; Don Wuertz, an investigator employed by Martinez during appellant's trial; and Charles Kirkwood, a retired professor of law. Martinez was unable to testify at the remand hearing, having suffered a stroke sometime after the trial.

The trial court concluded that Martinez did not represent appellant under an actual conflict of interest. Based on the limited nature of the remand by this court, the court of appeals dismissed appellant's appeal of the trial court's findings for lack of jurisdiction. *State v. Gillard* (Ohio 1995) (unreported).

The facts surrounding the alleged conflict of interest were largely undisputed. . . . In any event, whether an actual conflict of interest existed is a mixed question of law and fact, subject to *de novo* review on appeal. *Cuyler*, 446 U.S. at 342; *Winkler v. Keane*, 7 F.3d 304, 308 (2d Cir. 1993). Because the trial court is in a far better position to judge the credibility of the witnesses testifying at the remand hearing, its findings should be accepted unless clearly erroneous. *United States v. Gambino*, 864 F.2d 1064, 1071, fn. 3 (3d Cir. 1988). We find no clear errors in the trial judge's findings . . . .

A *possible* conflict of interest exists where the '"interests of the defendants *may* diverge at some point so as to place the attorney under inconsistent duties."' (Emphasis added.) *State v. Dillon* (1995), 74 Ohio St.3d 166, 168, 657 N.E.2d 273, 275-276, quoting 446 U.S. at 356, fn. 3. It follows, then, that

an *actual* conflict of interest exists if, '"during the course of the representation, the defendants' interests *do* diverge with respect to material factual or legal issue or to a course of action.'" (Emphasis added.) *Id.* at 169, 657 N.E.2d at 276, quoting *Cuyler*, 446 U.S. at 356; *see also*, *Winkler*, 7 F.3d at 307. Indeed, we have said that a lawyer represents conflicting interests "when, on behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose." *Manross*, 40 Ohio St.3d 180, 182 (1988). . . .

Martinez, appellant maintains, could not argue that William committed the murders as part of appellant's defense due to Martinez's duty to protect William from future prosecution. Martinez's sole defense strategy was an alibi defense. To this end, appellant and three other witnesses testified that appellant was at a New Year's Eve party at the home of friends at the time of the murders. Martinez also called William as a defense witness. William denied firing a gun at the crime scene immediately prior to the murders and denied any involvement in the murders. He also denied speaking to or seeing appellant after William's fight with Ensign.

At the remand hearing, Professor Kirkwood testified that the viable defense Martinez should, but could not, have presented was an alibi *and* an alternate suspect defense. Under this theory, instead of solely arguing an alibi defense, Martinez should have also argued that William committed the murders. In Kirkwood's opinion, the circumstantial evidence pointing to William's involvement made the alternate suspect a viable, plausible defense.

At the remand hearing, appellant also introduced a plea agreement between the state and William dated two and one-half years after appellant's trial while William was represented by counsel other than Martinez. According to the agreement, William pled guilty to the aggravated burglary of the Hendricks home, agreed to testify against appellant if appellant were to be retried and, in exchange, received probation for the offense. Appellant argues that the plea agreement demonstrates that the interests of appellant and his brother differed so that any attorney would have used William's involvement to exculpate appellant.

We disagree. We cannot say either that the alternative defense was viable or that Martinez's failure to argue, on behalf of appellant, that William was the "real killer" was due to Martinez's obligations to William, Although William may have been a plausible suspect, he was not an *alternative* suspect. Evidence of William's involvement was not inconsistent with appellant's guilt, *i.e.*, none of the evidence implicating William either negated appellant's involvement or strengthened his alibi.

To the contrary, the state claimed that *both* appellant and his brother were involved in the murders. For example, the state presented evidence that William's fight with Ensign provided appellant with the motive to kill Ensign. Additionally, the state called Ronald Webb, who testified that appellant confessed to him that "I pulled the trigger, and my brother's taking the fall."

Moreover, both appellant *and* his brother were positively identified by the attempted-murder victim, Ronnie Postlethwaite. Postlethwaite testified that he saw William fire the shots outside Hendricks's house. Twenty minutes later, Postlethwaite heard more than one person enter the house and then heard a shot fired in the kitchen. Soon after, Postlethwaite testified, appellant grabbed his hair from behind, turned his head around and shot him in the temple. Postlethwaite then saw appellant shoot his fiancee, Denise Maxwell, in the head while she slept on the couch. While he lay wounded at the scene, Postlethwaite identified appellant to the police as the shooter. Naturally, Postlethwaite's identification testimony and his credibility were crucial to the interests of *both* appellant and his brother.

If Martinez emphasized William's involvement in the murders, he would have conceded that the state's theory was in part correct. For example, by blaming William for the murders, Martinez risked substantiating Webb's testimony that William was "taking the fall" for appellant. Likewise, taking the position that William fired shots outside the murder scene that night would bolster the general credibility of Postlethwaite, the state's sole identifying witness, If the jury believed the portion of Postlethwaite's testimony identifying appellant as the gunman, evidence of William's involvement would not assist appellant's defense. On the other hand, if the jury believed William's testimony that he did not fire shots on the night of the murders, the jury would have necessarily rejected Postlethwaite's identification of William and would be more likely to reject his identification of appellant. By attacking the state's

> evidence implicating William, Martinez undermined the state's case against appellant.
>
> There is "no conflict of interest adversely affecting the attorney's performance if an attorney at trial does not raise a defense on behalf of his client because to do so is not in that client's interest even though it is also in the interest of another client that it not be raised. To the contrary, that is a coincidence of interests." *Gambino*, 864 F.2d at 1071. We find here that Martinez labored under a coincidence of interests rather than an actual conflict of interests.

State v. Gillard, 78 Ohio St.3d 548, 550-55 (1997). Contrary to the Ohio Supreme Court's opinion, the record demonstrates that Gillard's counsel did indeed labor under an actual conflict of interest.

It is undisputed that trial counsel Martinez represented both William and John during the investigation of this case.[6] After the state issued arrest warrants for each of the brothers, Attorney Martinez represented them both at a January 14, 1985 preliminary hearing in the Canton Municipal Court. (13 T. 448, 452; 16 T. 54; 1 T. 4). At that hearing, Martinez stated, "I ask that the Court in the interest of justice, dismiss the charges against William Gillard. I understand that the Court, based on the testimony, that there is probably probable cause to bind over John Gillard and I have no objections to that." (1 T. 93). The Court adopted Martinez's request, dismissing the charges against William and binding John over

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[6] Regarding the duel representation, Attorney Martinez himself declared, "I have represented Bill Gillard in this matter from the very first day. . . .I have represented them both." (12 T. 254-55).

to the grand jury. The Stark County Grand Jury indicted only John, but William remained a subject of police investigation for the same crimes. (2 T. 40-43; 3 T. 204; 6 T. 804, 806). Attorney Martinez continued to represent them both throughout the entire proceedings.

Gillard argues that his counsel acted under a clear conflict of interest because, despite the existence of physical evidence indicating that William Gillard might have been the shooter, Martinez steadfastly pursued an alibi defense for Petitioner rather than implicate William. The physical evidence implicating William was indeed substantial. William, armed with brass knuckles, attended the New Year's Eve party at Tim Hendricks' home. William was evicted from the party after he and another partygoer, Leroy Ensign, got into a bloody fight. William returned to the Hendricks home and fired a gun outside the house minutes before the murders occurred there and provided a false name to the police when apprehended several hours later. (11 T. 16). When apprehended, William's shirt had blood stains that matched one victim, and his jacket had blood stains that could not be excluded as coming from another victim. (12 T. 323-27). William also possessed a bullet matching those found at the crime scene. (12 T. 355, 357).

According to Professor Charles Kirkwood, an expert witness who testified for Gillard at the state remand hearing, the strongest defense in a homicide case is an alibi plus proof that someone else committed the crime. (Supp. T. pp 46-52). Yet, despite the physical evidence implicating William, Attorney Martinez steadfastly declined any opportunity to shift blame from John to William. Indeed, in my instances Martinez appeared overly concerned with *preventing* the admission of this evidence against William. For example, when the state called the state trooper who had apprehended

William hours after the crime, Attorney Martinez made a lengthy motion to suppress the evidence against William:

> At this time we are asking the Court not to permit any evidence or testimony regarding William Gillard who has who was charged with this crime originally on January 1[,] the warrant against him was issued on January 1. They are attempting now to bring in evidence in this case of another person that has no relation with this defendant outside of the fact that he's a brother . . . . I don't see how it has any relevance in the case against John Gillard who is the only man who has been indicted by the Grand Jury. . . . [T]hey couldn't, they don't have a case against Bill Gillard . . . and they are trying to get a case against John Gillard which they don't have, by associating [sic] these events of Bill Gillard with John Gillard.

(12 T. 309-10). Martinez concluded by declaring, "I just want this court to know this and I intend to have everyone know about it that Bill Gillard is free as the wind." (12 T. 319). When the Court refused to suppress the evidence against William, Attorney Martinez continued to protect him by eliciting testimony that the only all points bulletin issued regarding these crimes was for John, not William, and that charges for the crimes were only pending against John. (12 T. 340-42).

Moreover, the issue of conflict became readily apparent when Attorney Martinez called William Gillard to testify. The prosecution and the Court immediately informed William that his testimony might jeopardize his Fifth Amendment rights against self-incrimination, given that he was still under investigation for the crimes. The Court also noted the

potential conflict attached to Attorney Martinez, to which Martinez asserted, "I will say to this Court that I have represented Bill Gillard in this matter from the very first day. I do not feel that there is a question of a conflict. I think I am capable of advising him of his rights." (12 T. 254-55). Although the Court persisted in warning *William* of the potential conflict between his own rights and his testimony on John's behalf, the Court completely omitted any mention of the potential prejudice to *John* from Attorney Martinez's representation of William.

The record clearly demonstrates that "specific instances [suggesting] an actual conflict or impairment of [his] interests" permeated Gillard's trial. *See Hopkins*, 43 F.3d at 1119. The evidence in this case bifurcated along separate, distinct lines. While the testimonial and eyewitness evidence implicated John Gillard as the killer, the physical evidence clearly pointed towards William. Unconflicted counsel would have attacked the dual nature of the evidence, emphasizing the physical evidence against William and stressing that no physical evidence linked John to the crimes. Moreover, loyal counsel would have been better equipped to attack the eyewitness testimony against John.[7] Instead, Attorney

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[7] For example, as asserted in Petitioner's Fourth and Fifth grounds for relief, Postlewaite, immediately after being shot, named only "Gillard" as his assailant. Postlewaite later clarified that it had been "Dirty John Gillard" who had attacked him. Nonetheless, unconflicted counsel could certainly have pointed out that Postlewaite's immediate, on the scene identification could as easily have referred to William as to John. Moreover, although Martinez did attack Postlewaite's identification as unreliable due to the severe head and eye wounds Postlewaite had received, those attacks may have been more effective had Martinez presented the jury with a logical alternative suspect.

Martinez refused to present William as an alternative suspect making statements and introducing evidence seemingly designed only to protect William, often at John's expense.

Attorney Martinez clearly failed to provided the type of loyal, unconflicted representation envisioned by the Constitution, and that failure undermined the fairness of Petitioner's trial. Accordingly, Petitioner's First Ground for Relief, alleging that his attorney at trial operated under a conflict of interest, is well-taken.

> 2. *John Gillard's convictions and sentences are infirm because the trial court failed to hold a hearing regarding the conflict under which his trial counsel labored because trial counsel represented both John and William Gillard. U.S. Const. amends. V, VI, VII, and XIV.*

Gillard argues that, because the trial judge failed to hold a hearing on Gillard's claim of conflict of interest at trial, his habeas petition should be granted. The Supreme Court has several times revisited the issue of when the Sixth Amendment and *Strickland* require an evidentiary hearing on a purported conflict of interest, each in a slightly different context.

In *Holloway v. Arkansas*, the Court prescribed "automatic reversal" for situations where trial counsel actively objected to representing co-defendants simultaneously but was nonetheless ordered by the trial court to undertake the representation. *Holloway*, 435 U.S. at 488. The *Holloway* Court, noting that counsel is in the best position to determine whether a conflict exists, created the automatic reversal rule because of the difficulty in determining the precise harm to a

defendant when a timely objection as to conflict is ignored. *Id.* at 488-90.

In *Cuyler*, three co-defendants, tried separately, were all represented by the same counsel. No one objected to the representation, largely because counsel suggested the interests of the defendants were aligned. There the Court declined to extend the automatic reversal rule, holding that, absent objection, a defendant must demonstrate that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler*, 446 U.S. at 348-49. The Court also ruled that a trial court's duty to inquire into the propriety of a multiple representation arises only when "the trial court knows or reasonably should know that a particular conflict exists." *Id.* at 347.

In *Wood v. Georgia*, 450 U.S. 261 (1981), an obscenity case, a conflict arose while three defendants were being represented by their employer's attorney. The employer had been paying fines on behalf of his employers for violations occurring within the scope of their employment. The employer later decided that, instead of paying the fines for his employees, he would provide them with an attorney to challenge the underlying violations on equal protection grounds. The employer primarily aimed to reduce or eliminate the fines he would have to pay in the future, while the defendants' sought to avoid imprisonment. Thus, their interests in having the attorney present the equal protection argument diverged, presenting a potential conflict. There, the Court ruled that the conflict had been sufficiently apparent at the revocation hearing to require further inquiry. Because the Court "[could not] be sure whether counsel was influenced in his basic strategy decision by the interests of the employer who hired him," the Court remanded the case "to determine

whether the conflict of interest that th[e] record strongly suggests actually existed." *Id.* at 272-73.

Finally, in *Mickens*, the United States Supreme Court again clarified when a potential conflict of interest on the part of defense counsel requires a trial court to hold an evidentiary hearing.[8] *Mickens*, 535 U.S. 162. *Mickens* argued that, although counsel at trial made no conflict-related objection, and no readily apparent particular conflict existed as in *Wood*, the trial court's failure to investigate for conflict of interest nonetheless mandated automatic reversal. The Court declined to extend the automatic reversal rule, holding that where the trial court failed to inquire into a potential conflict of interest about which it knew or reasonably should have known, the defendant still must establish that this conflict of interest adversely affected counsel's performance. In other words, the "trial court's failure to inquire into a *potential* conflict" does not alter the *Cuyler* rule that "deficient performance of counsel must be shown." *Id.* at 1245 (emphasis added).

In Gillard's case, the trial judge found:

> In his second proposition of law, appellant challenges the remedy we fashioned in *Gillard II* for the trial court's failure to inquire into the possible conflict of interest during the original trial. Appellant contends

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[8] Walter Mickens, Jr. received a sentence of death for his commission of pre-meditated murder during or following the commission of an attempted forcible sodomy. Later on, federal habeas counsel discovered that Mickens' lead (appointed) trial attorney, Bryan Saunders, had represented Hall on juvenile charges just before the murder. The federal habeas district court held an evidentiary hearing and denied Mickens' habeas petition. *Mickens*, 535 U.S. 162.

that a new trial is the sole remedy for the trial court's failure to conduct an inquiry into a potential conflict of interest at trial after the trial court has been alerted to one.

In support of his argument, appellant cites *Wood v. Georgia*, 450 U.S. 261, 272 n. 18 (1981), where the court stated that the United States Constitution "mandates a reversal when the trial court has failed to make an inquiry even though it knows or "reasonably should know that a particular conflict exists." (Emphasis added.) In *Wood*, the trial court failed to inquire into a possible conflict of interest after the court was alerted to its potential during a probation revocation heating. Nonetheless, the *Wood* court ordered the trial court to "hold a hearing to determine whether the conflict of interest * * * actually existed * * *," rather than a new revocation hearing. Only "[i]f the court finds that an actual conflict of interest existed was it to grant a new revocation hearing. 450 U.S. at 273-274.

Additionally, the United States Constitution is violated by an actual conflict of interest, not a possible one. *Cuyler v. Sullivan*, 446 U.S. 335, 348-350 (1980); *State v. Manross*, 40 Ohio St.3d at 182 . . . When a possible conflict of interest exists, a defendant is entitled only to an inquiry by the trial court. The trial court's failure to conduct the inquiry, however does not transform a possible conflict into an actual one. A retrial for failing to inquire into a possible conflict of interest is premature.

Rather, reversal is mandated only if an actual conflict is found. *See Brien v. United States*, 695 F.2d 10, 15,

fn. 10 (1st Cir. 1982); *United States v. Winkle*, 722 F.2d 605, 611-612 (10th Cir. 1983); *Bonin v. Vasquez*, 807 F.Supp. 589, 606, fn. 16 (D.C.Cal. 1992). Appellant's second proposition of law is overruled.

In light of this Court's finding of an actual conflict of interest which affected trial counsel's performance, *see* Ground 1, *supra*, the Court finds it unnecessary to address Gillard's second ground for relief. This Court has already determined that Gillard's counsel labored under an actual conflict, a finding which mandates reversal under *Cuyler* and *Holloway*. Hence, there is no need to consider whether to grant a retrial because of the trial court's failure to inquire into the conflict, since this Court has already granted relief on the underlying conflict claim. Accordingly, this claim is moot.

B. Trial Judge's Impartiality

3. John Gillard's convictions and sentences are constitutionally infirm because the trial judge assigned to his case was not impartial. U.S. Const. amends. V, VI, VII, and XIV.

In this claim, Gillard argues that trial Judge Unger was impermissibly biased. In particular, Gillard argues that Judge Unger should have recused himself from hearing his case because: (a) Judge Unger, as the elected county prosecutor for Stark County, had investigated Gillard in 1972 for his membership in the Outlaw motorcycle gang and possible involvement with a murder while a member of that gang (Gillard was cleared of those charges), and (b) Judge Unger heard evidence that Gillard had threatened witness Webb and

his family during a pretrial motion to perpetuate Webb's testimony.

The due process clause of the Fourteenth Amendment guarantees a criminal defendant, as any litigant, the right to a fair trial in a fair tribunal. *In re Murchison*, 349 U.S. 133, 136 (1955); *Alley v. Bell*, 307 F.3d 380, 386 (6th Cir. 2002). If a habeas court determines that bias by a state judge resulted in a constitutional violation, then the court is required to overturn the state court decision. *See Maurino v. Johnson*, 210 F.3d 638, 645 (6th Cir. 2000) ("Because judicial bias effects the entire trial process it is not subject to harmless error review") (citing *Chapman v. California*, 386 U.S. 18, 23 & n. 8 (1966)). The Supreme Court's decision in *Liteky v. United States*, 510 U.S. 540, 552 (1994), provides the standard for deciding judicial bias claims. *Alley*, 307 F.3d at 386. In *Liteky*, the Court explained that "the pejorative connotation of the terms 'bias' and 'prejudice' demands that they be applied only to judicial predispositions that go beyond what is normal and acceptable." *Liteky* at 552; *see also Maurino*, 210 F.3d at 645; *Alley*, 307 F.3d at 386.

Furthermore, "[e]xcept in extreme cases, to be actionable, bias must stem from an extra-judicial source." *Alley*, 307 F.3d at 388. As stated by the Supreme Court:

> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a

> bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Liteky, 510 U.S. at 555 (emphasis in original).

Gillard's first assertion of judicial bias challenges Judge Unger's impartiality based on his prior service as the county prosecutor. Prior to his trial, Gillard filed an affidavit challenging Judge Unger's partiality on this basis. Alicia Wyler, responding for Judge Unger, documented that none of the assistant prosecutors had contact with the case while Judge Unger was the elected prosecutor. Based on these affidavits, the Ohio Supreme Court ruled Judge Unger fit to try Gillard's case. That finding was neither contrary to nor an unreasonable application of established Supreme Court law. *Williams*, 529 U.S. 362; *see also Jenkins v. Bordenkircher*, 611 F.2d 162, 166 (6th Cir. 1979) ("We have found no habeas corpus case which holds that it is a denial of due process for a judge to preside over a jury trial in a criminal case where the judge, as a prosecutor, had previously been involved in proceedings against the defendant in entirely unrelated cases."). Further, the state court's factual findings in this matter are presumed correct under the AEDPA. 28 U.S.C. § 2254(e)(1). Gillard has not shown otherwise by clear and convincing evidence.

Gillard's second allegation is that his constitutional rights were violated when the trial court failed to recuse itself after conducting a witness certification hearing pursuant to Ohio R. Crim. P. 16(B)(1)(e). Crim. R. 16(B)(1)(e) provides as follows:

> Names and addresses of witnesses shall not be subject to disclosure if the prosecuting attorney certifies to the court that to do so may subject the witness to physical or substantial economic harm or coercion. Where a motion for discovery of the names and addresses of witnesses has been made by a defendant, the prosecuting attorney may move the court to perpetuate the testimony of such witnesses in a hearing before the court, in which hearing the defendant shall have the right of cross-examination.

Before trial, the prosecutor moved to exclude Ron Webb's name and address from the witness list or to perpetuate his testimony via deposition because Gillard had threatened Webb or his family. Judge Unger allowed the prosecutor's motion to perpetuate Webb's testimony based on the allegation that Gillard, as a member of the Outlaws motorcycle gang, had threatened witnesses and family members to ensure favorable testimony, both in this and in previous trials. Although the defense later withdrew its motion for discovery, thereby mooting sanctions for non-disclosure of the witness' name, the trial judge permitted the prosecutor to state, *ex parte,* her reasons for believing that Webb was in danger.

> MISS WYLER: Let the record reflect that a hearing laying the foundation for the Prosecuting Attorney's certification of certain witnesses in this case is taking place in Judge Unger's chambers. Present in chambers behind closed doors are the official court reporter, Alicia Wyler and Dick Reinbold, Assistant Prosecuting Attorneys, and His Honor Judge Unger.
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> Your Honor, as background to this case, the Prosecuting Attorney's office has received intelligence information concerning this particular defendant, John

Gillard. We know through our intelligence information, that consists of the records of fellow law enforcement agencies not only in this state but in other states, we know from the state of Tennessee--Knoxville, to be exact--that the defendant acted as president of a national organization of motorcycle gangs; that gang being the Outlaws. We also have intelligence information from the El Paso Intelligence Center, known as Epic, who has documentation of individuals who are in fact members of the National Organization of Motorcycle Gangs. The defendant has an Epic number and is in the Epic computer. We know from the investigation of this case that the defendant has been actively involved in this Outlaw Motorcycle Gang, not only in this state but also in the state of Tennessee, the state of Missouri, and the state of Arizona.

Now, with respect to the certification of witnesses in this case, the Prosecutor's office has made a decision to use a man from West Virginia, who in fact turned this defendant in to the sheriff's department in West Virginia on January 4th of this year. He also has material information as to the admission of guilt made by the defendant prior to being turned in. We brought this man, whose name is Ron Webb, into the Stark County Grand Jury and elicited his testimony on February 13th of this year. Later on in the month, namely February 27, 1985, we brought his wife, Connie Webb, in the Stark County Grand Jury and elicited testimony from her as well. Through testimony taken under oath it was learned that the defendant's brothers; one who is named Gregg Gillard and one who is named Dan Gillard, went to a location directly across the street from the Webb residence and

was inquiring as to the whereabouts of Mr. Webb and anyone else involved with turning their brother into the sheriff's department. It was at this time that the defendant's brothers, sometime very close after the date of his arrest, a direct threat was made on Mrs. Webb and the threat was in the terms as follows: "Once we find out who turned our brother in, we'll level that house," and they were referring to the Webb residence. The Webb residence is an apartment dwelling. It's a house divided into two apartments, one up and one down. The Webbs live downstairs.

The conduct of the two Gillard brothers, according to the witness, was very threatening and [the Webbs] indeed and in fact felt threatened by their conduct. The identification as to the two individuals being Dan and Gregg Gillard came as a result of their giving their names to Mrs. Webb and also as a result of, I believe, showing Mrs. Webb some form of identification which bore the names Gregg Gillard and Dan Gillard.

We would also indicate to the Court that as a result of the investigation of this case and taking statements under oath from Karen Fohrenbach, who is the wife of the unindicted co-defendant Tim Fohrenbach, and a woman by the name of Vickie Henke, who is the girlfriend of the unindicted Tim Fohrenbach, it was learned that after Mr. Fohrenbach was taken into custody as a material witness in this case and in an effort to attempt to obtain his testimony against John Gillard, a threatening phone call was made to Mr. Fohrenbach's sister, where the caller said over the phone: "If Tim talks, one of his loved ones will die." Further, Mr. Fohrenbach's mother banks in this town,

and I have received information that she was heard in the bank by tellers saying that their lives had been threatened as a result of Mr. Fohrenbach being taken into custody as a material witness by the Prosecuting Attorney's office.
Also, a witness by the name of Tim Stef, who is the bartender and manager of Sandy's Fireball Express on 12th Street here in Canton, reported to the Canton Police Department that a member of the Outlaw Motorcycle Gang contacted him--I believe on two occasions--over the phone, calling himself "Big Ed," and made threatening remarks over the phone concerning witnesses who would be considered witnesses on behalf of the State of Ohio in this case. As I said, that threat was reported to the Canton Police Department and the supplement documents that.

Therefore, in light of the nature of the circumstances surrounding this case and the threats--not only made to the witness whom I have certified but the threats that have been made to other individuals who were thought to be friendly to the State of Ohio--I felt compelled to certify the witness Ron Webb, whom I'm requesting to be deposed, who indeed not only turned the defendant in to the police but also has information coming from the defendant as to his guilt.

THE COURT: It will be so ordered.

MISS WYLER: I would request that this record be sealed and that all parties in this room be on court order not to divulge the information contained in this certification, that it be sealed and ordered not opened

until such time as an appellate court would want to review the record.

THE COURT: It is so ordered.

The rule provides two distinct alternatives: the state may be relieved of its obligation to disclose the names of endangered prosecution witnesses, or the testimony of that witness may be perpetuated by deposition prior to trial. However, both forms of relief require the prosecution to show the existence of an undue risk of harm to the witness.

On direct appeal, the court ruled that:

> [W]hen a judge hears information that a defendant has attempted to harm, coerce, or intimidate an opposing witness, there is an unnecessary risk that the judge will harbor a bias against that defendant. It is true. . . that judges who issue arrest warrants and preside at preliminary hearings are not barred from presiding over the defendant's trial, even though they have already found the existence of probable cause. *See Withrow v. Larkin*, 421 U.S. 35, 56 (1975). We also recognize that trial judges preside at hearings on motions to suppress evidence, exposing themselves to probative evidence of guilt that may later prove inadmissible, and that this exposure does not taint their impartiality.
>
> However, the information revealed to the judge here was not merely evidence of guilt, as in the examples mentioned above. Rather, it consisted of representations that Gillard was a leader of a motorcycle gang, and that his brothers had engaged, on his behalf and perhaps at his behest, in an

organized-crime tactic of intimidating witnesses by threatening the lives of their families.

Clearly, such information is more inflammatory and harder to disregard than the sort of information heard by the judge who issues an arrest warrant or presides over a motion heating. Where, as here, the certification is *ex parte,* it is especially troublesome, for the defendant has no chance to deny or explain the allegations. It portrays a defendant as a dangerous person and a subverter of the criminal justice system. Moreover, some such information will be placed before the court in every case where the prosecutor makes a certification under Crim. R. 16(B)(1)(e). It is the very purpose of the rule to place such information before the court so that witnesses may be protected. But where the judge who hears and is permitted to act upon this type of information then presides over the trial, the appearance of fairness is impaired and fairness itself jeopardized.

We hold that, when the state seeks to obtain relief from discovery or to perpetuate testimony under Crim. R. 16(B)(1)(e), the judge who disposes of such a motion may not be the same judge who will conduct the trial.

However, we also hold that violation of the rule we announce today is not *per se* prejudicial. Thus, while it was error in this case for the judge to have presided at trial after hearing the state's certification, we find that error harmless in light of the overwhelming evidence of guilt, including an eyewitness account of the murder, Gillard's subsequent flight, his admission

> to Webb, [illegible] his possession of the murder weapon two weeks before the crime.

Gillard, 533 N.E.2d at 276-77.

The Sixth Circuit has approved the above-quoted Ohio Supreme Court rule, holding that harmless error review is appropriate when a trial judge improperly presides over a Rule 16 certification hearing. *See Esparza v. Mitchell*, 310 F.3d 414, 424 (6th Cir. 2002) ("The Ohio Supreme Court has held that it is error for a judge to preside at such a hearing and then preside at the subsequent trial, as the prejudicial information often revealed at such hearings could tend to prejudice a judge against a defendant. In such instances, however, harmless error analysis is appropriate.") (citations omitted). As recognized in *Esparza*, "[t]he nature of the criminal justice system often requires judges to consider evidence and then dismiss it from their minds." *Id.* (citing *Withrow v. Larkin*, 421 U.S. 35, 39 (1975)). Moreover, the state appellate court's conclusion that the trial judge's error in Gillard's case was harmless is not contrary to, or an unreasonable application of, federal law. Accordingly, Gillard's third ground for relief is denied.[9]

C. Prosecutorial Misconduct

"[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is fairness of trial, not culpability of prosecutor." *Smith v. Phillips*, 455 U.S. 209,

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[9] As a postscript to Gillard's judicial bias claims, this Court notes that it has thoroughly and exhaustively read through the trial transcripts and found the trial judge's conduct during trial to have been laudably fair and evenhanded.

219 (1982). Therefore, a death sentence should not be reversed on constitutional grounds even if the prosecutor's actions are undesirable or even universally condemned unless those actions "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (citing *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)). Furthermore, a prosecutor's actions are to be viewed in their appropriate context. Thus, inappropriate prosecutorial comments, standing alone, will not justify reversal of a conviction obtained in an otherwise fair proceeding. *United States v. Young*, 470 U.S. 1 (1985); *United States v. Bond*, 22 F.3d 662 (6th Cir. 1994).

The Court of Appeals for the Sixth Circuit has adopted a two-pronged analysis for determining when prosecutorial misconduct warrants a new trial. *United States v. Carter*, 236 F.3d 777, 783 (6th Cir. 2001) (citing *United States v. Carroll*, 26 F.3d 1380, 1385-87 (6th Cir.1994)). Initially, the court must determine whether the prosecutor's conduct and remarks were improper. *Id.* If the answer is affirmative, the court must then weigh and consider four factors in determining whether the flagrancy of the improper acts warrants reversal: (1) whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant, (2) whether the conduct or remarks were isolated or extensive, (3) whether the remarks were deliberately or accidentally made, and (4) whether the evidence against the defendant was strong. *Id.* (citing *Carroll*, 26 F.3d at 1385). *See also Sizemore v. Fletcher*, 921 F.2d 667, 670 (6th Cir. 1990).

4. The state of Ohio knowingly presented false testimony and argument to the jury. U.S. Const. amends. V, VI, VII, and XIV.

Gillard asserts that the prosecutor introduced false testimony as to whether police initially focused their murder investigation on himself, or his brother William. Specifically, Gillard contends that the State bolstered their case with the "Falsehoods" that key witness Ronnie Postlethwaite had identified John Gillard immediately at the scene and that the police investigation immediately focused on John.

The Sixth Circuit has ruled that in order to make a successful prosecutorial misconduct claim premised on a prosecutor's alleged use of perjured testimony, a petitioner must show: (1) that the statements he complains of were actually false, (2) that the statements were material, and (3) that the prosecution knew they were false. *Coe v. Bell*, 161 F.3d 320, 343 (6th Cir. 1998). Thus, Gillard first must demonstrate the untruthfulness of the relevant testimony.

Gillard suggests that the timing of Postlethwaite's identification of John Gillard as the shooter supports his claim. Police witnesses testified that Postlethwaite identified Gillard as his shooter "immediately." Indeed, the court so found. *Gillard*, 553 N.E.2d at 274. However, police reports suggest that witnesses on the scene identified only "Gillard," and that not until later questioning of Postlethwaite at the hospital did he identify his assailant as "Dirty John Gillard." Indeed, until "John Gillard" was identified, police investigation centered on William Gillard. (Traverse A, D, E).

Testimonial inconsistencies are not necessarily false testimony. *See, e.g., United States v. Lochmondy*, 890 F.2d

817, 822-23 (6th Cir. 1989). The police testimony attacked in this claim concerned only the timing of Postlethwaite's identification of John Gillard as the shooter. Other murder scene witnesses apparently differentiated and identified John as the shooter. Thus, when viewed in conjunction with Gillard's later statement to Webb admitting to the shooting, and other evidence of John Gillard's culpability, this Court finds any error in describing Postlethwaite's initial identification of his assailant harmless. *Carter*, 236 F.3d at 783.

5. BRADY Claims

Gillard argues that his convictions and sentences are void under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the state failed to disclose relevant information to defense counsel and withheld exculpatory evidence concerning Ronald Postlethwaite's and William Gillard's statements. *See Brady v. Maryland*, 373 U.S. 83 (1963). The Warden does not deny withholding the evidence in question, but rather argues that the evidence was not material, exculpatory evidence.

To establish a claim under *Brady*, "the petitioner has the burden of establishing that the prosecutor suppressed evidence; that such evidence was favorable to the defense; and that the suppressed evidence was material." *See Carter v. Bell*, 218 F.3d 581,601 (6th Cir. 2000) (citing *Moore v. Illinois*, 408 U.S. 786, 794-795 (1972)). "The inquiry is objective, independent of the intent of the prosecutors." *Id.* (citing *Brady*, 373 U.S. at 87). "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the

outcome." *United States v. Bagley*, 473 U.S. 667, 676 (1985).

Gillard claims that the prosecution withheld evidence impeaching Ron Postlethwalte's trial testimony. In particular, Gillard suggests that the state improperly withheld a statement Postlethwaite made to Guy Ensign, several taped interviews of Postlethwaite, an interview with Bill Gillard, a statement by Ronald Webb, and a statement by Donald Gorby. The Fifth District Court of Appeals aptly summarized this evidence:

> Appellant claims that the State improperly withheld statements of Tim Hendricks and Walter Lamb, and a police report containing a statement Postlethwaite made to Lamb, in which the witnesses claim that Postlethwalte told them "Gillard" was the shooter. Appellant claims this evidence is exculpatory, as he did not identify the shooters specifically as "John" Gillard, as opposed to his brother "William" Gillard. The statement that Gillard was the shooter, as opposed to John Gillard, is not exculpatory. Its value for impeachment purposes would have been marginal at best. The evidence is not material and exculpatory in nature.
>
> Appellant argues that the State should have given him the police report containing Postlethwaite's statement to police that John Gillard shot him. Obviously, this evidence would be inculpatory in nature, rather than exculpatory, as it was consistent with Postlethwaite's testimony at trial.
>
> Appellant argues that the State improperly withheld a taped interview of Postlethwaite in which he says that

he was unaware of the details of the prior fight between William Gillard and Guy Ensign, and would have to talk to other party goers to find out what happened.

Appellant claims that this statement demonstrates that Postlethwaite relied on other party-goers for details as to what happened at the party. Postlethwaite's knowledge, or lack thereof, of the details of the fight appellant's brother had with Ensign is irrelevant to his identification of John Gillard as the man who shot him later in the evening. This was not material exculpatory evidence.

Appellant argues that the State should have disclosed a police interview with David Richey. Richey told police that William Gillard was trying to get out of town after the shooting, and called him after being arrested in an attempt to relay a message to appellant that he was in jail. Appellant argues that William Glllard's plan to flee provides evidence of his guilt, and corroborates appellant's story that he went to West Virginia for the purpose of getting Bill an attorney. This evidence is merely corroborative in nature, and is not exculpatory. This statement was not material, as it did not directly relate to any of the issues concerning the shooting. . . .

Appellant argues that the State improperly withheld a taped interview with Ronald Webb, in which he stated that he went to the police because appellant had the hots for his wife. Appellant has not demonstrated that this statement is exculpatory in nature. The evidence is of very minimal impeachment value, as it merely

> explains Webb's motivation for revealing Gillard's whereabouts to the police. . . .
>
> Finally, appellant argues that the State improperly withheld a letter to Tim Hendricks from the Canton Law Department, regarding problems with Hendricks' threatening witnesses in the case. This letter was not in any way exculpatory.

Recently, the Supreme Court further explained the prejudice or "reasonable probability" prong of *Brady*. In *Strickland v. Greene*, 527 U.S. 263 (1999), the Court ruled that, although the prosecutor had violated the first two *Brady* prongs by failing to provide exculpatory material to the defense, the petitioner did not sufficiently demonstrate "a reasonable probability that his conviction or sentence would have been different had these materials been disclosed." *Id.* at 296. Although the principal witness strongly and positively identified the defendant during his murder trial, police notes suggested that prior to trial the witness had been far less certain of the events she observed. The Court held that even had those earlier notes been released to the defense, in light of the overwhelming independent evidence of the defendant's guilt, the defendant had not demonstrated a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" *Bagley*, 473 U.S. at 676.

As in *Stickler*, Gillard's *Brady* claim must fail. As the state appellate court determined, ample evidence corroborated the outcome of the trial, including Gillard's admission to Webb and his identification by Postlewaite at trial. In short, the jury reasonably could have found that John Gillard was

the actual assailant. Thus, Gillard's *Brady* claim is without merit.[10]

6. The prosecutor's misconduct during the pre-trial, trial, and mitigation phases of Petitioner's capital trial violated his rights. U.S. Const. amends. V, VI, VII, and XIV.

Glllard argues that his convictions and sentences are void under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the State at various times improperly:

a. engaged in a character assault on Glllard (referring to Glllard as "Dirty John," etc).;
b. argued facts outside the record;
c. expressed personal belief, and
d. made inflammatory arguments.

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[10] Nonetheless, this identification claim is so intertwined with Ground One that, although not egregious enough to justify relief on its own, it underscores the merit behind John Glllard's conflict of interest claim. For example, were John's counsel unconflicted; the fact that Postlewaite's initial identification had named only "Glllard" would have been quite exculpatory, and would have bolstered John's best defense: that William had committed the crimes. Counsel could have pointed out that, not only did the physical evidence point towards William, but the initial eyewitness identification could have indicated that *either* Glllard had committed the crimes. On the other hand, were this Court to have concluded that John Glllard's counsel had in fact chosen the best defense for him (straight alibi), this evidence would no longer be exculpatory. Because of this unique juxtaposition, the Court finds that this claim offers support for Gillard's cumulative error claim, Ground 17, discussed *infra*.

Additionally, Gllard asserts that the prosecution utilized improper victim impact statements and inappropriately commented on the credibility of Gllard and witness Webb.

"[I]t is notable how often courts cite improper argument by a prosecutor and how seldom they reverse convictions because of it." *United States v. Bess*, 593 F.2d 749, 757 (6th Cir. 1979). To determine whether improper prosecutorial conduct has rendered a trial fundamentally unfair as a due process violation, the Sixth Circuit considers four factors:

(1) The likelihood that the remarks would mislead the jury or prejudice the accused;
(2) Whether the remarks were isolated or extensive;

(3) Whether the remarks were deliberately or accidentally presented to the jury; and

(4) Whether other evidence against the defendant was substantial.

Washington v. Hofbauer, 228 F.3d 689, 708 (6th Cir. 2000) (citing *Boyle v. Million* 201 F.3d 711, 717 (6th Cir. 2000)).

The majority of the conduct which Gllard protests occurred during closing arguments. Thus, it was confined to a brief, solitary period at the end of a long trial. The prosecution did not generally repeat the purportedly improper remarks, and those remarks were not intended to confuse or mislead the jury. Moreover, several of the allegedly improper statements fairly summarized the evidence, the law, events at trial, and other issues raised by Gllard in his testimony. Finally, the trial judge used proper limiting instructions to correct many of the allegedly improper statements. (28 T 51-57).

The remaining claims also lack merit. Victim impact statements are not unconstitutional. *See, e.g., Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ("A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury' s decision as to whether or not the death penalty should be imposed. There is no reason to teat such evidence differently than other relevant evidence is treated."). Furthermore, as the prosecutor only commented on Webb and Gillard's credibility in the context of showing that other evidence corroborated that testimony, he did not act improperly. *See, e.g., Cannell v. Texas*, 529 U.S. 513, 556-557 (2000).

7. John Gillard's convictions and sentences are constitutionally infirm because the prosecutor adduced testimony that Glllard had refused to make a statement after being advised by the arresting officer of his Miranda rights. U.S. Const. amends. V, VI, and XIV.

The record belies any misconduct. Canton Detective Sergeant Michael O'Brien testified that he talked to Glllard in Wellsburg, West Virginia, on January 4, 1985. O'Brien advised Glllard of his Miranda rights and said that he had two warrants for Gillard's arrest. O'Brien testified that Glllard said "that the Canton Police Department was barking up the wrong tree. . . and that the shootings in question had been over a drug deal that had gone sour." O'Brien "asked him to provide details of that to corroborate . . . or to further clarify that statement or who might have been involved and so forth." Glllard refused: "He said *I don't want to talk any more*." (emphasis added).

On January 8, Glllard returned to Canton police who again informed him of his rights. After Glllard expressed his willingness to talk, Detective Sergeants Jerry Steiner and Jerry Reynolds interrogated him. According to Steiner, Glllard "shook his head in the negative and says I really don't know . . . what's going on here . . . but I was at a New Year's Eve Party . . . when this all happened." Steiner asked him where the party had been and who had been there "and [said] we'll definitely check this out and clear you if we have the wrong person. [Glllard] stated no, never mind, and *he would not give me the location of the party or the names of anyone that was at the party*." (emphasis added.)

The defendant argues that this testimony by O'Brien and Steiner violated *Doyle v. Ohio*, 426 U.S. 610 (1976) (holding that although the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings). The state argues that this testimony did not use Gillard's post-arrest silence against him. Rather, since Glllard did not remain silent, but freely gave his alibi, it was proper to inform the jury that he had refused to give details to corroborate that alibi. We agree.

In *Anderson v. Charles*, 447 U.S. 404 (1980), the United States Supreme Court rejected as a "formalistic understanding of 'silence'" the notion that "[e]ach of two inconsistent descriptions of events may be said to involve 'silence' insofar as [each] omits facts included in the other version." *Id.* at 409. Importantly, *Anderson* approvingly cited *United States v. Goldman*, 563 F.2d 501 (1st Cir. 1977), a case with facts analogous to those at bar. Like Glllard, Goldman "chose to make an exculpatory statement." *Id.* at 503. He refused, however, to answer certain questions concerning the names of people to whom he referred in his story and who could have

corroborated his statement. The First Circuit held that Goldman, because he chose to provide an exculpatory statement, could not claim that he relied on Miranda warnings as to his alibi. Thus, his refusal to answer follow-up questions could be used to discredit that statement. "If [a defendant] talks, what he says *or omits* is to be judged on its merits or demerits, and not on some artificial standard that only the part that helps him can be later referred to." *Id.* (quoting *Vitali v. United States*, 383 F.2d 121, 123 (1st Cir. 1967)) (emphasis added). Thus, Gillard's *Doyle* claim must fail.

D. Ineffective Assistance of Counsel

In order to establish a claim for ineffective assistance of counsel, a habeas petitioner must demonstrate that (1) counsel's performance was deficient, and (2) counsel's deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 698. The benchmark for judging a claim of ineffectiveness is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Id.* at 686.

The Sixth Circuit, interpreting *Strickland*, has rejected habeas corpus claims which challenged strategic defense counsel decisions. In *Meeks v. Bergen*, the Court held that, where more than one possible defense exists and counsel conducts a substantial investigation into each of the possible defenses, the strategic choice made as a result of that investigation is "virtually unchallengeable." *Meeks*, 749 F.2d 322, 328 (6th Cir. 1984)(quoting *Strickland*, 466 U.S. at 690-91). Furthermore, the Court noted that, even should counsel fail to conduct a substantial investigation into each of several plausible lines of defense, the representation might nonetheless be effective. *Meeks* at 328; *Strickland* at 690-91.

This Court may "not conjure up tactical decisions an attorney could have made, but plainly did not." *Griffin v. Warden*, 970 F.2d 1355, 1358 (4th Cir. 1992); *see also Harris v. Reed*, 894 F.2d 871, 878 (7th Cir. 1990).

Even where defense counsel performed deficiently, a petitioner still must show actual prejudice in order to prevail on the claim. *Strickland*, 466 U.S. at 698. "The 'prejudice' component of . . . *Strickland* [tests] whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). To amount to prejudice, an error must be such that there is "a reasonable probability that . . . the result of the proceeding would have been different" in the absence of the error. *Strickland* at 694. "[U]nreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Lockhart* at 372.

8. John Gillard's convictions and sentences are constitutionally infirm because his trial counsel failed to provide reasonably effective assistance of counsel. U.S. Const. amends. V, VI, VII, and XIV.

Glllard argues that his trial counsel represented him ineffectively because his counsel:

a. Failed to investigate prosecutor's witnesses;
b. Failed to file pretrial motions including failing to object to counts 3 and 4, "aider and abettor" claims and to suppress John Gillard's initial statements;
c. Failed to conduct reasonable voir dire
d. Failed to develop a case against William Glllard;

e. Failed to adequately cross-examine Postlethwaite;
f. Failed to adduce testimony from Don Wenz;
g. Failed to obtain ballistics expert or criminologist;
h. Failed to cross examine state's witnesses; and
i. Failed to object to various prosecutorial actions, statements, and evidence.

Sub-claims b and i are dealt with on their merits elsewhere in this opinion. As the Court found no prejudicial error with regards to the underlying merits of those claims, it will not hold that counsel acted ineffectively for failing to object to those circumstances at trial. Additionally, sub-claims a, e, f, h, and i, to the extent they are even arguable,[11] are precisely the sort of strategic defense decisions which are "unchallengeable" on habeas review. *Meeks*, 749 F.2d at 328.

Contrary to Gillard's assertion, his trial counsel conducted voir dire reasonably. Voir dire of prospective jurors lasted from May 6-15, 1985, and resulted in 1493 pages of transcript. A review of that transcript reveals no unreasonable restrictions on counsel's questions or his investigation into the impartiality of the jury as finally constituted. Sub-claim c is denied.

Gillard's claim that his counsel ineffectively failed to employ ballistics and eyewitness experts lacks merit. Gillard's counsel employed an alibi defense at trial, arguing that he was not present when the crimes were committed on January 1,

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[11] The record suggests that counsel conducted searching cross examination of Postlethwaite and other governmental witnesses. See (10-19 T.) The record further shows that defense counsel only failed to present Don Wenz's testimony because Wenz failed to qualify as an expert witness.

1985. Indeed, Gllard presented several witnesses to testify that he spent that night at another party. Under those circumstances, ballistics and expert evidence might have undermined Gillard's asserted alibi. Moreover, the pursuit of an alibi defense to the exclusion of ballistic evidence is the sort of strategic decision which is virtually "unchallengeable" on habeas review. *Meeks*, 749 F.2d at 328. Counsel's failure to engage and present the testimony of ballistics or eyewitness experts in this case did not constitute ineffective assistance of counsel.

Gillard's assertion that his trial counsel acted ineffectively by failing to develop a case against William Gllard is repetitive of Petitioner's First Ground for Relief. In its analysis surrounding that claim, the Court found that Petitioner's counsel had labored under a conflict of interest which prevented him from developing and presenting evidence that William Gllard, rather than John Gllard, may have committed the murders. For those reasons, the Court granted the Writ on Ground One.

> 9. *John Gillard's convictions and sentences are constitutionally infirm because his trial counsel failed to provide reasonably effective assistance of counsel during mitigation. U.S. Const. amends. V, VI, VII, and XIV.*

Gllard argues that his counsel represented him ineffectively at the mitigation stage because:

(a) Counsel inadequately investigated;
(b) Counsel presented no mitigating evidence;
(c) Co-counsel did not attend the mitigation hearing; and
(d) Counsel lacked experience in capital proceedings.

The Court addresses each of these claims individually.

(a) Counsel inadequately investigated.

Despite Gillard's assertion, there is no evidence that counsel inadequately investigated mitigation factors in this case. Indeed, to investigate and/or present mitigation evidence would have undermined Gillard's steadfast claim that he was elsewhere when Postlethwaite, Maxwell, and Ensign were shot. Moreover, the jury heard substantial mitigation evidence throughout the trial. During Gillard's own testimony he discussed precisely the same factors which he complains that an investigation would have unearthed, such as his background and family ties. (25 T. 759-776) Indeed, the state appellate courts, in re-weighing the aggravating and mitigating factors drew those additional mitigating factors into account from the record:

> (1) It is unlikely the offense would have been committed, but for the fact that [Gllard] had been provoked by another and/or others in the commission of violence because of a fight which his brother, William Gllard, and Leroy T. Ensign had engaged in during a New Year's Eve party at the residence where the killings took place.
> (2) There was no evidence of significant history of prior criminal convictions and delinquency, and
> (3) The evidence supports the fact that [Gllard] had been consuming alcoholic beverages prior to the shootings.

(1 A. 121, 125) Under these circumstances, where the jury actually heard all of the mitigating evidence Gllard wished to present, no viable ineffective assistance of mitigation counsel claim exists.

(b) Counsel presented no mitigating evidence

Gillard's claim that counsel waived mitigation during the penalty phase of trial while having fought the charges during the culpability phase was not unconstitutionally inconsistent. Gillard's steadfast claim of actual innocence throughout and beyond his trial is not inconsistent with a decision to waive mitigation. The Sixth Circuit has held that putting forth no mitigating evidence, while disfavored, may be constitutional under the proper circumstances. *See Workman v. Bell*, 178 F.3d 759, 770-71 (6th Cir. 1998) (holding that "[failing to present any mitigating evidence is disfavored," but not necessarily unconstitutionally ineffective). In *Stanley v. Zant*, the Eleventh Circuit found that strategic reasons not to present mitigating evidence may be clear:

> Although we give full recognition to the rule . . . that the eighth and fourteenth amendments require defendants to have the opportunity to present any evidence in mitigation, we cannot draw from these cases a corresponding duty on defense counsel to present general character evidence in every capital case. Acknowledgment of the importance of character testimony and the right to have it considered by the sentencing body when presented does not of itself speak to the duty of counsel.

Zant, 697 F.2d 955, 961 (11th Cir. 1983); *see also Adams v. Wainwright*, 709 F.2d 1443, 1445-46 (11th Cir. 1983) (counsel not ineffective for arguing for mercy rather than presenting mitigating evidence; counsel may reasonably have decided that raising defendant's background would do more harm than good). In light of Gillard's steadfast claim of innocence and his counsels' legitimate fear that Gillard's past criminal and motorcycle gang activities would be admitted to

the jury, counsel reasonably decided to waive mitigation. *Payne*, 78 F.3d at 346. This decision did not render counsel's assistance ineffective.

(c) Co-counsel did not attend mitigation.

Regarding this sub-claim, Gillard offers no evidence supporting his claim that co-counsel's failure to appear at his mitigation hearing in any way affected the outcome of his trial or "so undermined the proper functioning of the adversarial process that the trial [could not] be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

(d) In light of the court's resolution of subclaims (a), (b), and (c), Gillard's assertion that his counsel lacked experience in capital litigation is inexplicable. Indeed, Gillard does not even argue that prejudice resulted from having "inexperienced" capital counsel represent him. Gillard's claims of ineffective assistance of counsel are denied.

E. Excessive Courtroom Security

10. John Gillard's convictions and sentences are constitutionally infirm because the trial court employed excessive security in such a manner as to violate John Gillard's right to a fair trial. U.S. Const. amends. V, VI, VII, and XIV.

Every criminal defendant is entitled to a fair and impartial trial. *Massey v. Moore*, 348 U.S. 105, 108 (1954). For a defendant to receive a fair and impartial trial, he must be presumed innocent. *Coffin v. United States*, 156 U.S. 432, 453 (1895). This includes the "physical indicia of innocence." *Kennedy v. Cardwell*, 487 F.2d 101, 104 (6th Cir. 1973)

(citing *United States v. Samuel*, 431 F.2d 610, 614 (4th Cir. 1970)).

Cases dealing with physical restraint and security in criminal trials fall into several categories. The first category, the "garb of innocence" cases, include cases where the defendant stands trial in shackles. "The rule that a prisoner brought into court for trial is entitled to appear free from all bonds or shackles is an important component of a fair and impartial trial. And shackles should never be permitted except to prevent the escape of the accused, to protect everyone in the courtroom, and to maintain order during trial." *Woodards v. Caldwell*, 430 F.2d 978, 982 (6th Cir. 1970). Physical bonds and restraints impair the defendant's right to be a competent witness for himself and detract from the dignity and decorum of the judicial process. *Illinois v. Allen*, 397 U.S. 337, 344 (1970) ("the use of... [shackling and gagging] is itself something of an affront to the very dignity and decorum of the judicial proceedings that the judge is seeking to uphold").[12]

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[12] In *Allen*, the Supreme Court applied the Sixth Amendment right of a defendant to be present at trial to a disorderly defendant who had to be removed from the courtroom. The Court recognized the discretion of the trial judge in dealing with such conduct and held that a defendant can lose his right to be present at trial if, after warnings by the trial judge, he continues to act disruptively. The Court suggested three constitutionally permissible ways for dealing with such a situation: 1) binding and gagging the defendant; 2) citing him for contempt; and 3) expelling him from the courtroom. The Court cautioned, however, that "even to contemplate [those] technique[s] . . . arouses a feeling that no person should be tried while shackled and gagged except as a last resort" *Allen*, 397 U.S. at 344.

A second category of cases involving the indicia of innocence pertains to use of an excessive number of guards in the courtroom during trial. *Kennedy*, 487 F.2d at 108; *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970). In general, "a defendant has a right to be tried in an atmosphere free of partiality created by the use of excessive guards except where special circumstances, which in the discretion of the trial judge, dictate added security precautions." *Kennedy*, 487 F.2d at 108. The rationale behind this right is that guards surrounding or nearby the defendant during a jury trial are likely to suggest to the jury that the defendant is dangerous or untrustworthy. *Id.* The additional guards could also materially interfere with a defendant's ability to consult with counsel. However, the use of guards for security purposes, when wisely employed, provides the best means for protecting a defendant's fair trial right. *Id.*[13]

Gillard's argument is that the trial court's placement of two uniformed and armed deputies near him during the trial impugned his presumption of innocence. Thus, Gillard's case falls into the second category of those cases described above. The state court found that, in light of the seriousness of the charges against him and his past history with motorcycle gangs, the security measures employed during Gillard's trial were minimal. *Gillard*, 1998 WL 351442 * 6 (Ohio 1998).

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[13] The third group of cases includes those where jurors see the defendant in shackles for a short period of time either in the courtroom or elsewhere in the courthouse. *Kennedy*, 487 F.2d at 109. This group of cases is most often characterized as frivolous. The only danger to the accused in this group is the possible prejudice the brief incidents may engender, which is much less than where the accused sits throughout his trial in shackles. *See generally Kennedy*, 487 F.2d at 108-10, and the cases cited therein.

As to the number and placement of guards in the courtroom, this Court cannot rule that the trial court abused its discretion in deploying security as it did. The burden of proving a constitutional violation rests with Gllard. *See Holbrook v. Flynn*, 475 U.S. 560, 569 (1986) (holding that a defendant must demonstrate that security measures were either inherently prejudicial or caused actual prejudice in order to establish a constitutional violation); *United States v. Elder*, 90 F.3d 1110, 1131 (6th Cir. 1996). As Gllard has not shown that placement of a uniformed, armed security guard in front and behind him during trial created either inherent or actual prejudice, he has failed to carry his burden. *See, e.g., Holbrook*, 475 U.S. at 569-571 (finding the use of four armed guards in a trial of six defendants not inherently prejudicial); *Elder*, 90 F.3d at 1131 (holding that even a "courtroom constantly full of security personnel" did not violate the defendants' constitutional rights in the absence of a showing of jury prejudice).

F. Jury Instructions

11. John Gillard's death sentence as to Leroy Ensign is constitutionally infirm because the trial court instructed the jury that they could convict Mr. Gllard of the felony murder capital specification if they found that he aided and abetted in the course of aggravated murder. U.S. Const. amends. V, VI, VII and XIV.

In this claim, Gllard argues that inclusion of the "aider/abettor" language in counts 3 and 4 of the indictment prejudiced him. The jury found in both of those counts that Gllard "purposefully and with prior calculation and design" caused the death of Leroy Ensign and that Gllard purposefully killed Ensign while fleeing immediately after

committing or attempting to commit Aggravated Burglary. Ohio Rev. Code Ann. § 2911.11. Both of these findings are alternative to finding Gillard was an "aider or abettor." As a result, "aiding and abetting" another in the killing of Ensign was never at issue in this case, and no prejudice occurred. *See Clemons v. Mississippi*, 494 U.S. 738, 745 (1990) ("Nothing in the Sixth Amendment as construed by our prior decisions indicates that a defendant's right to a jury trial would be infringed where an appellate court invalidates one of two or more aggravating circumstances found by the jury, but the death sentence after itself finding that the one or more valid remaining aggravating factors outweigh the mitigating evidence."). Accordingly, this claim is denied.

12. John Gillard's convictions and death sentences are constitutionally infirm because the trial court failed to properly instruct the jury during the trial phase. U.S. Const. amends. V, VI, VII, and XIV.

Gillard argues that the trial court misinstructed the jury on (a) eyewitness testimony, (b) lesser included offenses, and (c) aggravated burglary. We find no error.

An incorrect jury instruction, whether merely undesirable, erroneous, or even universally condemned, does not necessarily warrant federal habeas corpus relief. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Rather, the instruction must violate a constitutional right before relief may be granted. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). On review, a court must determine whether there is "a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990). The propriety of the instruction "'may not be judged in artificial isolation,' but must be considered in the context

of the instructions as a whole and the trial record." *Estelle*, 502 U.S. at 72 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147(1973)). Rarely will an erroneous jury instruction justify habeas relief when petitioner made no objection in the trial court. *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977).

(a) Gillard first argues that the trial court improperly instructed the jury on how to weigh eyewitness testimony. Due process does not require that the jury be instructed on eyewitness testimony where, as here, the government's case rests on the testimony of more than one witness. *See United States v. Tipton*, 11 F.3d 602, 606 (6th Cir. 1993) ("identification instructions 'need be given only where there is a danger of misidentification due to lack of corroborative evidence.'") (quoting *United States v. Boyd*, 620 F.2d 129, 131-32 (6th Cir), *cert denied,* 449 U.S. 885 (1980)). Moreover, Gillard's claim of error in instructing the jury on eyewitness testimony is meritless. The judge instructed the jury as follows:

> EYEWITNESS TESTIMONY
>
> SOME THINGS YOU MAY CONSIDER IN WEIGHING THE TESTIMONY OF IDENTIFYING WITNESSES ARE:
>
> 1. CAPACITY OF ANY WITNESS, THAT IS, THE AGE, INTELLIGENCE, DEFECTIVE SENSES, IF ANY, AND THE OPPORTUNITY OF THE WITNESSES TO OBSERVE
> 2. THE WITNESS' DEGREE OF ATTENTION AT THE TIME HE OBSERVED THE OFFENDER.
> 3. THE ACCURACY OF ANY WITNESS' PRIOR DESCRIPTION OR IDENTIFICATION, IF ANY.

4. WHETHER THE WITNESS HAD HAD THE OCCASION TO OBSERVE THE DEFENDANT IN THE PAST.
5. THE INTERVAL OF TIME BETWEEN THE COMMISSION OF THE CRIMES AND THE IDENTIFICATION.
6. ALL SURROUNDING CIRCUMSTANCES UNDER WHICH ANY WITNESS HAS IDENTIFIED THE DEFENDANT.

IF, AFTER EXAMINING THE TESTIMONY OF ANY IDENTIFYING WITNESS, YOU ARE NOT CONVINCED BEYOND A REASONABLE DOUBT THAT THE DEFENDANT IS THE OFFENDER, YOU MUST FIND THE DEFENDANT NOT GUILTY.

(27 T. 138A). This instruction is consistent with that cited in *United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972), and approved by the Sixth Circuit in *United States v. O'Neal*, 496 F.2d 368, 373 (6th Cir. 1974) and *United States v. Scott*, 578 F.2d 1186, 1191 (6th Cir), *cert denied,* 439 U.S. 870 (1978). See *Tipton*, 11 F.3d at 606. This claim is, therefore, properly dismissed.

(b) Regarding Gillard's second claim of instructional error, the trial judge correctly instructed the jury as follows:

YOU MUST MAKE A DETERMINATION AS TO THE GUILT OR INNOCENCE OF THE DEFENDANT AS TO THE COUNT OF AGGRAVATED MURDER **AND**, AND ONLY IF, YOU FIND THE DEFENDANT NOT GUILTY OF THE COUNT OF AGGRAVATED MURDER UNDER 2903.01(A), YOU WILL THEN CONSIDER THE GUILT OR THE INNOCENCE OF

> THE DEFENDANT WITH REGARD TO THE LESSER CRIME OF MURDER. THE SAME IS TRUE WITH THE SECOND COUNT OF THE INDICTMENT, THE ALLEGATION OF THE AGGRAVATED MURDER OF DENISE R. MAXWELL BY THE DEFENDANT, IN CONJUNCTION WITH R.C. SECTION 2903.011(B) AND THE LESSER ALLEGATION OF THE COUNT OF MURDER. AND AGAIN, IN THAT SITUATION, YOU MAY NOT FIND THE DEFENDANT GUILTY OF BOTH AGGRAVATED MURDER AS TO 2903.01(B) AND THE LESSER INCLUDED OFFENSE OF MURDER. YOU MUST FIRST DETERMINE THE GUILT OR THE INNOCENCE OF THE DEFENDANT WITH RESPECT TO AGGRAVATED MURDER UNDER 2903.01(B) AND THEN, AND ONLY THEN, CONSIDER THE GUILT OR THE INNOCENCE OF THE DEFENDANT WITH RESPECT TO THE LESSER CHARGE OF MURDER UNDER 2903.01(B).

(27 T. 163). Instructions such as this one have repeatedly withstood constitutional challenge. *See, e.g., State v. Thomas*, 533 N.E.2d 286, 291-292 (Ohio 1988). Gillard points to no United States Supreme Court case contrary to the *Thomas* decision.

(c) Gillard's final claim of instructional error asserts that the trial judge misinstructed the jury on the aggravated burglary charge. The court instructed as follows:

> IN THE SEVENTH COUNT OF THE INDICTMENT, THE DEFENDANT, JOHN GRANT GLLLARD, IS CHARGED WITH AGGRAVATED

BURGLARY. BEFORE YOU CAN FIND THE DEFENDANT GUILTY, YOU MUST FIND BEYOND A REASONABLE DOUBT THAT ON OR ABOUT THE FIRST DAY OF JANUARY, 1985 AND IN STARK COUNTY, OHIO THE DEFENDANT BY FORCE, STEALTH, OR DECEPTION TRESPASSED IN AN OCCUPIED STRUCTURE OR SEPARATELY SECURED OR SEPARATELY OCCUPIED PORTION THEREOF WITH PURPOSE TO COMMIT A FELONY, TO-WIT: AGGRAVATED MURDER; AND THAT AT THE TIME OF SO DOING, THE DEFENDANT ADDITIONALLY DID ANY ONE OF THE FOLLOWING:

(1) INFLICTED OR ATTEMPTED TO INFLICT PHYSICAL HARM UPON DENISE R. MAXWELL OR LEROY T. ENSIGN OR RONNIE W. POSTLETHWAITE; OR
(2) HAD A DEADLY WEAPON ON OR ABOUT HIS PERSON OR UNDER HIS CONTROL; OR
(3) THAT THE OCCUPIED STRUCTURE INVOLVED WAS THE PERMANENT OR TEMPORARY HABITATION OF ANOTHER, IN WHICH AT THE TIME ANY PERSON WAS PRESENT OR LIKELY TO BE PRESENT.

(27 T. 260).

Glllard argues that this instruction, particularly that portion stating that aggravated burglary is committed when a defendant trespasses in a dwelling with the intent to commit aggravated murder, is impossibly circular, as the jury could neither find him guilty of aggravated burglary without finding him guilty of aggravated murder, nor find him guilty of

aggravated murder without finding him guilty of aggravated burglary. This is simply not true. The instruction offers two alternatives to convicting Gillard of aggravated murder in determining the aggravated burglary charge: (1) carrying a deadly weapon, and (2) entering a known occupied dwelling at a time any person was present or likely to be present. The jury heard ample evidence to allow them to consider both of these alternatives. Thus, the jury instruction did not require the jury to find (and, indeed, there is no evidence suggesting that the jury in fact found) Glllard guilty of aggravated murder in finding him guilty of aggravated burglary.

13. John Gillard's death sentences are constitutionally infirm because the trial court failed to properly instruct the jury during the mitigation hearing.

Glllard argues that the trial court misinstructed the jury on:

a. what constitutes a mitigating factor,
b. mitigating factor as residual doubt;
c. mitigating factors not claimed;
d. reasonable doubt;
e. how to weigh mitigating factors and aggravating circumstances;
f. the death penalty being a mere recommendation; and
g. failed to instruct the jury that it consider trial evidence as mitigating factors.

The Court reviews these error allegations individually.

a. What constitutes a mitigating factor?

The mitigation factor "instruction" that Gllard complains of occurred during the initial voir dire colloquy, where the judge likened mitigation to the effect on the texture of hot water to which ice had been added, rather than to the sentencing instruction. Shorthand references to legal concepts during voir dire cannot be equated with final instructions. *See, e.g., State v. Stallings*, 732 N.E. 2d 159, 168 (Ohio 2000); *Scott v. Mitchell*, 209 F.3d 854, 878-79 (6th Cir. 2000) (excoriating trial judge's improper comments on publicity of the case during voir dire, but finding those comments cured by subsequent proper instructions); *Zobel v. Tate*, 36 Fed. Appx. 772, 778-79 (6th Cir. 2002) (holding that improper statements made by the court during voir dire were harmless error in light of proper instruction at trial); *United States v. Okeezie*, 985 F.2d 562 (6th Cir. 1993) (finding that confusing statements made during voir dire were corrected by proper sentencing instructions). The judge's sentencing instruction on mitigation properly cured any confusion that might have occurred several weeks earlier during voir dire. (28 T. 58-59).

b. Mitigating factor of residual doubt.

In this sub-claim, Gllard argues that Judge Unger's failure to instruct the jury that residual doubt as to Gillard's guilt could be considered a mitigating factor in sentencing him violated his constitutional rights. At the time of his conviction, both Ohio and United States Supreme Court precedent allowed counsel to urge the jury to consider "residual doubt" as a mitigating factor during the sentencing

phase of trial.[14] Gillard's attorney utilized this practice in his closing arguments during mitigation. At no time, however, has the constitution "required" that the jury be instructed on residual doubt as a mitigating factor. *See Franklin v. Lynaugh*, 487 U.S. 164, 172-173 (1988) (noting that Supreme Court precedent did not "endorse capital sentencing schemes which permit such use of 'residual doubts,' let alone suggest that capital defendants have a *right* to demand jury consideration of 'residual doubts' in the sentencing phase.") (emphasis in original). Accordingly, this sub-claim is denied.

c. Reading statutory mitigating factors when none were claimed.

Likewise, it is not prejudicial error for a judge to read a list of statutory mitigating factors, even if one or more of those factors are not claimed by the defendant, so long as the prosecution and trial court do not comment on the factors not claimed. *State v. Du Pew*, 528 N.E.2d 542, 558 (Ohio 1988); *State v. Grant*, 620 N.E.2d 50, 68 (Ohio 1993). In his sentencing instructions, Judge Unger read the statutory mitigating factors of Ohio Rev. Code Ann. § 2929.04(B) to the jury. He did not, however, comment on statutory mitigating factors not claimed by Gllard, nor allow the prosecution to do so. Moreover, the Ohio appellate courts' re-weighing of aggravating circumstances and mitigating factors cured any confusion that might otherwise have arisen at trial. *State v. Lott*, 51 Ohio St.3d 160, 170 (1990).

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[14] This is no longer true. *See Buell v. Mitchell*, 274 F.3d 337, 358-359 (6th Cir. 2001), and the cases therein cited.

d. Reasonable doubt.

In this sub-claim, Gllard challenges the constitutionality of Judge Unger's instruction on reasonable doubt. In instructing the jury on reasonable doubt, Judge Unger read Ohio's statutory definition of reasonable doubt:

REASONABLE DOUBT

NOW THEN, WHAT IS REASONABLE DOUBT? THE LEGISLATURE OF THE STATE OF OHIO DEFINED "REASONABLE DOUBT" AS FOLLOWS:

QUOTE

"REASONABLE DOUBT IS PRESENT WHEN AFTER YOU HAVE CAREFULLY CONSIDERED AND COMPARED ALL THE EVIDENCE, YOU CANNOT SAY YOU ARE FIRMLY CONVINCED OF THE TRUTH OF THE CHARGE. REASONABLE DOUBT IS A DOUBT BASED ON REASON AND COMMON SENSE. REASONABLE DOUBT IS NOT MERE POSSIBLE DOUBT, BECAUSE EVERYTHING RELATING TO HUMAN AFFAIRS OR DEPENDING ON MORAL EVIDENCE IS OPEN TO SOME POSSIBLE OR IMAGINARY DOUBT. PROOF BEYOND A REASONABLE DOUBT IS PROOF OF SUCH CHARACTER THAT AN ORDINARY PERSON WOULD BE WILLING TO RELY AND ACT UPON IT IN THE MOST IMPORTANT OF HIS OWN AFFAIRS." CLOSED QUOTE.

(28T.54). This exact instruction has been consistently upheld against constitutional challenge. *See, e.g., Thomas v. Arn*, 704 F.2d 865, 869 (6th Cir. 1983); *Scott*, 209 F.3d at 884. This sub-claim is without merit.

e. How to weigh mitigating factors and aggravating circumstances.

In instructing the jury on how to weigh aggravating circumstances and mitigating factors, the court properly instructed as follows:

OUTWEIGH

TO "OUTWEIGH" MEANS TO WEIGH MORE THAN, TO BE MORE IMPORTANT THAN. IF THE WEIGHT OF THE MITIGATING CIRCUMSTANCES IS EQUAL TO OR EXCEEDS THE WEIGHT OF THE AGGRAVATING CIRCUMSTANCES, YOU MUST VOTE AGAINST THE IMPOSITION OF THE DEATH PENALTY AND PROCEED TO CONSIDER ALTERNATIVE SENTENCES I WILL INSTRUCT YOU ON SHORTLY. THE EXISTENCE OF MITIGATING FACTORS DOES NOT PRECLUDE OR PREVENT THE DEATH SENTENCE IF THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE MITIGATING FACTORS.

IT IS THE QUALITY OF THE EVIDENCE THAT MUST BE GIVEN PRIMARY CONSIDERATION BY YOU. THE QUALITY OF THE EVIDENCE MAY OR MAY NOT BE COMMENSURATE WITH THE QUANTITY OF THE EVIDENCE, THAT IS,

THE NUMBER OF WITNESSES OR EXHIBITS PRESENTED IN THIS CASE.

IT IS NOT ONLY THE QUALITY OF THE AGGRAVATING CIRCUMSTANCES VERSUS THE QUANTITY OF THE MITIGATING FACTORS WHICH IS TO BE THE BASIS OF YOUR DECISION. THE QUALITY OR IMPORTANCE OF THE MITIGATING FACTORS AND THE AGGRAVATING CIRCUMSTANCES MUST ALSO BE CONSIDERED.

IT IS NOT NECESSARY THAT THE DEFENDANT PROVE ALL THE MITIGATING FACTORS WHICH YOU MAY FIND FROM THE EVIDENCE. IF YOU CONCLUDE THAT ONE, A COMBINATION OF ANY, OR ALL ARE SUFFICIENT IN YOUR MIND THAT YOU HAVE A REASONABLE DOUBT THAT THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE MITIGATING FACTOR OR FACTORS, YOU MUST VOTE AGAINST IMPOSITION OF THE DEATH PENALTY AND PROCEED TO CONSIDER THE ALTERNATIVE SENTENCES I WILL INSTRUCT YOU ON SHORTLY.

Ohio state courts have held that such an instruction is not erroneous where the trial court instructs the jury to focus on the quality of the aggravating factors, rather than solely on the quantity. *See State v. Goodwin*, 703 N.E.2d 1251, 1265-66 (Ohio 1999) (refusing to overturn an instruction similar to that offered here, even where aggravating factors were mistakenly duplicated by instruction). Furthermore, unlike in the cases cited by Gillard, the trial judge in the instant case did not erroneously enhance the number of aggravating factors. *See*

State v. Penix, 513 N.E.2d 744, 746-47 (Ohio 1987) (finding error where trial court focused on quantity of aggravating factors *after* improperly duplicating the factors). Glllard cites no United States Supreme Court case in contradiction of *Goodwin*.

f. The death penalty being a mere recommendation.

Glllard argues that, by characterizing the jury's verdict as a "recommendation," the trial court improperly relieved the jury of the responsibility for its decision whether to sentence Glllard to death. However, the Ohio capital statute defines a death finding as a "recommendation." The Sixth Circuit has approved this statutory characterization as constitutionally sound. *Coleman v. Mitchell*, 268 F.3d 417, 435-36 (6th Cir. 2001) Therefore, this sub-claim is denied.

g. Failure to instruct the jury that it consider trial evidence as mitigating factors.

In instructing the jury on mitigating factors, Judge Unger noted that mitigating factors included, but were not limited to, "the nature and circumstances of the offense, the history, character, and background of the offender and . . . any other factors that are relevant to the issue of whether the offender should be sentenced to death." (28 T. 58-59) This instruction sufficiently directs the jury to consider trial evidence as well as any mitigation evidence presented in determining whether the aggravating circumstances outweigh the mitigating evidence. Indeed, the Sixth Circuit recently approved of this precise jury instruction in denying habeas relief to a capital petitioner. *See Mason v. Mitchell*, 2003 WL 252101, *27 (6th Cir. 2003) (holding that the use of an identical mitigation instruction "adequately guided the jury and did not restrict its consideration of mitigating evidence."). Furthermore, it is

clear that the trial judge and the state appellate courts did consider evidence presented during the guilt phase in re-weighing the aggravating circumstances and the mitigating factors, including Gillard's lack of significant prior criminal activity, his consumption of alcohol before the killings, his character and background, and that he had been provoked by his brother's fight with Ensign earlier that evening. (2 A. 121-128). "This sub-claim is denied.

G. Appeal

14. John Gillard's convictions and sentences are constitutionally infirm because he was not afforded the effective assistance of counsel on appeal. U.S. Const. amends. V, VI, VII, and XIV.

Gillard contends that his appellate counsel represented him ineffectively on direct review. In particular, he argues that his due process rights were abridged when his first appellate counsel failed to argue:

1. Co-counsel's absence from mitigation proceedings;
2. Discovery violations;
3. Eliciting hearsay evidence;
4. Admission of Gillard's statement in violation of Miranda;
5. Admission of irrelevant and prejudicial "other acts" evidence;
6. Admission of "gruesome photos;"
7. Prosecutors repeated use of irrelevant and inflammatory expert witnesses;
8. The court's failure to properly instruct the jury on trial

9. Conviction of Glllard of four aggravated murders and 8 aggravating specification when only two homicides occurred;
10. Including the aiding and abetting language in the indictment;
11. Prosecutor's comment on victim impact evidence;
12. Prosecutor's misconduct;
13. Inclusion of non-statutory aggravating circumstances;
14. Comments diminishing the jury's responsibility;
15. Mitigation phase instructions;
16. Preclusion of mitigating factor of residual doubt;
17. Extra aggravating circumstances;
18. Mitigating factors;
19. Sufficiency of the evidence;
20. Disparate treatment of John Glllard when compared to his co-conspirator,
21. Inappropriateness of the death penalty; and
22. Trial counsel ineffectiveness.

It is hard to claim that appellate counsel obtaining reversal of a conviction was ineffective. Moreover, except for claim 20, all of Gillard's ineffective assistance of appellate counsel claims are either unargued or are based on claims of error found lacking merit elsewhere in this decision. Glllard cannot base an ineffective assistance of counsel claim on his counsels' failure to object to non-reversible error. *See*, *e.g.*, *Strickland*, 466 U.S. at 687-688.

Proportionality review of a death sentence is not constitutionally required. *Pulley v. Harris*, 465 U.S. 37, 44-45 (1984). Moreover, Glllard received the proportionality review mandated by Ohio Rev. Code § 2929.05 and *Ohio v. Steffen*, 509 N.E.2d 383 (Ohio 1987). The Ohio statute entitles Glllard only to a comparison of his case to other cases

where the death penalty was imposed. He received this comparison on direct appeal. *See, e.g., Glllard*, 679 N.E.2d at 283-285; *Glllard*, 1990 WL 94632 at *3. Nonetheless, Glllard argues that the death sentence he received is not proportional to the lesser sentence his brother, William Glllard, received after pleading guilty.

The procedural facts underlying this claim are not in dispute. A jury sentenced John Glllard to death for the aggravated murders of Maxwell and Ensign and the attempted murder of Postlethwaite. William Glllard, on the other hand, pleaded guilty to lesser charges and agreed to cooperate in the investigation and retrial of John Glllard. At the time of his plea, William Glllard was no longer seriously implicated in the murders of Maxwell or Ensign and the attempted murder of Ron Postlethwaite. *See, e.g., State v. Eley*, 77 Ohio St. 3d. 174 (1996).

The Ohio Supreme Court has consistently held that disparity of treatment between accomplices does not justify reversal of a sentence of death where neither sentence is illegal or an abuse of discretion. *Id.*; *State v. Issa*, 752 N.E.2d 904 (Ohio 2001). Federal courts have ruled similarly. *See, e.g., McCleskey v. Kemp*, 481 U.S. 279, 306-07; *Hatch v. State of Oklahoma*, 58 F.3d 1447 (1995); *Russell v. Collins*, 998 F.2d 1287 (5th Cir. 1993).

15. John Gillard's convictions and death sentences are invalid because the state appellate court failed to conduct a fair and adequate appellate review of John Gillard's Death Sentence. U.S. Const. amends. V, VI, VII, and XIV.

In this ground for relief, Glllard challenges the constitutionality of the proportionality review undertaken by

the Ohio courts, both as a rule and as applied. The record shows that both the Court of Appeals and the Ohio Supreme Court conducted particularly thorough, independent reviews of Gillard's death sentence for proportionality and excessiveness, as required under O.R.C. § 2929.05(A). *See Glllard*, 1990 WL 94632 *3; *Glllard*, 679 N.E.2d at 283-285. Both courts found Gillard's death sentence to be commensurate with death sentences imposed in similar cases.

Glllard argues that the only meaningful construction of § 2929.05(A), which requires a death sentence to be weighed against "similar cases" as part of a proportionality review, is that the death sentence must be compared to other cases in which the death penalty was *sought*, rather than *imposed*. This Court disagrees.

As a preliminary matter, the Court notes that "there is no federal constitutional requirement that a state appellate court conduct a comparative proportionality review." *McQueen v. Scroggy*, 99 F.3d 1302, 1333-34 (6th Cir. 1996) (citing *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984) ("There is . . . no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed.")). Second, the Ohio Supreme Court has long construed the § 2929.05(A) requirement that appellate courts compare a death sentence to other sentences in "similar cases" as requiring comparison to other cases in which death sentences have been *imposed*. *State v. Steffen*, 509 N.E.2d 383, 394-395 (Ohio 1987), *cert. denied*, 482 U.S. 916 (1988) ("Since proportionality review is not constitutionally mandated . . ., this court is relatively free, the confines of the statute, to determine the pool of cases to be used for comparison."); *State v. Green*, 609 N.E.2d 1258 (Ohio 1993) (holding that a death sentence imposed on one defendant cannot be compared to the life sentence a co-

defendant received for a capital offense). Habeas review is not available for state court determinations of state law. *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). Accordingly, Glllard fails to show that either the statute or the review undertaken by Ohio courts clearly violate established Supreme Court law.

H. Constitutionality of Ohio's Capital Punishment Scheme

16. John Gillard's convictions and death sentences is constitutionally infirm because Ohio's capital punishment system operates in an arbitrary and capricious manner. U.S. Const. amends. V, VI, VII, and XIV.

Glllard argues that Ohio's death penalty statute violates the U.S. Constitution in that:

a. the death penalty statute imposes arbitrary and unequal punishment;
b. the statute employs unreliable sentencing procedures;
c. the capital sentencing process fails to provide individualized sentencing;
d. the system burdens a defendant's right to trial by jury;
e. the statute requires mandatory submission of reports and evaluations;
f. the definition of mitigating factors violates the reliability component of the Eighth Amendment;
g. the statute is used to aggravate Ohio's aggravated murder statute;
h. Ohio Rev. Code Ann. §§ 2929.03(d)(1) and § 2929.04 are unconstitutionally vague; and
i. the statute violates international law (the International Covenant on Civil and Political

Rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, and the Convention on the Elimination of all Forms of Racial Discrimination).

These claims have all been raised and found wanting in other Supreme Court and Sixth Circuit opinions. *See, e.g., Cooey v. Coyle*, 289 F.3d 882, 922-928 (6th Cir. 2002) (and cases therein cited); *Coleman v. Mitchell*, 268 F.3d 417, 441-44 (6th Cir. 2001). They are similarly unavailing here.

I. Cumulative Error

17. Mr. Gillard's convictions and death sentences are invalid under the Federal constitutional guarantees of due process, equal protection, the effective assistance of counsel, a fair tribunal, an impartial jury, and a reliable sentence due to the cumulative errors in the misconduct by the state officials and witnesses, and the systematic deprivation of his right to the effective assistance of counsel. U.S. Const. amends. V, VI, VII, and XIV.

Finally, Gillard argues that his convictions and sentences are void because the cumulative effect of all Gillard's claimed errors deprived him of a fair trial and appeal. This Court agrees.

"Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair." *Walker v. Engle*, 703 F.2d 959, 963 (6th Cir. 1983) (citing several cases from other circuits for the same proposition). In the instant case, this Court has already

granted habeas relief on Petitioner's claim that his counsel at trial labored under a conflict of interest which rendered Petitioner's trial unfair. Moreover, although this Court did not grant relief for Petitioner's assertions in Ground 5, the Court noted that the alleged errors in that claim, while insufficient to rise to the level of a constitutional violation on its own, underscored the unfairness of Petitioner's trial in light of the conflict of interest. When considered together, the Court finds that trial counsel's refusal to shift blame for the murders to his other client, William Glllard, and counsel's derivative inability to challenge Postlewaite's initial generic identification of his assailant as "Glllard," deprived Petitioner of his constitutional rights. Gillard's Seventeenth Ground for relief accordingly, is well-taken.

VI. CONCLUSION

For the foregoing reasons, the Court hereby **GRANTS IN PART and DENIES IN PART** John Gillard's Amended Petition Under 28 U.S.C. § 2254 For A Writ Of Habeas Corpus For A Person In State Custody (ECF #29). Accordingly, Petitioner's conviction is **VACATED**. The State shall have 120 days from the date of the issuance of this Order to release or retry Petitioner. On the Court's own motion, execution of this Order and, hence, its effective date, is stayed pending appeal.

Certificate of Appealability

In recent decisions, the Sixth Circuit Court of Appeals has determined that neither a blanket grant or denial of a Certificate of Appealability ("COA") is appropriate to conclude a capital habeas case as it "undermine[s] the gate keeping function of certificates of appealability, which ideally should separate the constitutional claims that merit the close

attention of counsel and this court from those claims that have little or no viability." *Porterfield v. Bell*, 258 F.3d 484, 487 (6th Cir. 2001); *see also Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001) (remanding certificate of appealability motion for further district court analysis). Therefore, in concluding this Opinion, the Court now considers whether to grant a COA as to any of the claims Gillard presented in his 28 U.S.C. § 2253 petition. That statute states in relevant part:

> *** (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2253. This language is identical to the requirements of the pre-AEDPA statute that required a habeas petitioner to obtain a Certificate of Probable Cause. The sole difference between the pre- and post-AEDPA habeas statutes is that the petitioner must now demonstrate the denial of a constitutional right, rather than merely a federal right. The U.S. Supreme Court, interpreting the impact of AEDPA on the habeas statute, held that § 2253 codified the standard set forth in *Barefoot v. Estelle*, 463 U.S. 880 (1983), but for the substitution of the word "constitutional" for "federal." *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). Thus, the Court determined that "[t]o obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a

constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Id.* at 483-484 (quoting *Barefoot*, 463 U.S. at 893 n.4).

Guided by the above standard, the Court finds that three issues merit further review.

First, the Court grants a COA as to Gillard's claim that Judge Unger labored under an impermissible conflict of interest (Ground 3). Although the Court found Gillard's claim lacking in merit, a reasonable jurist might find otherwise. Thus, the Court **GRANTS** a COA on the issue of Judge Unger's conflict of interest.

Secondly, the Court finds that reasonable jurists could debate whether trial counsel's representation during mitigation constituted effective assistance. The Court held that counsel's decision to argue residual doubt as the sole mitigating factor was consistent with Gillard's alibi defense but recognizes that other jurists might disagree with this conclusion, particularly as to the approach taken by Attorney Martinez in this case. Accordingly, a COA is **GRANTED** for Ground 9, subparts (a) and (b).

Finally, the Court **GRANTS** a COA on Ground 5, Petitioner's *Brady* claim. As discussed above, the Court found this claim insufficient to rise to the level of a constitutional violation on its own. However, reasonable jurists might conclude otherwise. *See infra*, note 10.

The Court finds no other claims to be debatable among jurists of reason, as no other ground for relief comes close to presenting a federal constitutional or legal violation. Moreover, many of Gillard's claims involve time-worn legal arguments that this Court and established precedent have consistently rejected. Consequently, the Court **DENIES** a COA as to all other claims for relief.

IT IS SO ORDERED.

/s/ Peter C. Economus - August 26, 2003
PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE

APPENDIX D

SUPREME COURT OF OHIO

No. 98-1157

[Filed April 28, 1999]

The STATE of Ohio,
Appellee,

v.

GILLARD,
Appellant.

JUDGES: MOYER, C.J., DOUGLAS, RESNICK, F.E. SWEENEY, PFEIFER, COOK and LUNDBERG STRATON, JJ., concur.

OPINION

PER CURIAM.

Gillard is not entitled to relief under App.R. 26(B). A prerequisite for such relief is a finding that "the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency." App.R. 26(B)(9).

Gillard was not denied the effective assistance of counsel on his first appeal as of right--*i.e.*, his direct appeal to the

court of appeals in 1987.[1] His counsel won the appeal for him. We cannot see how the assistance of counsel could have been more effective than that.

Moreover, assuming that Gillard had a viable ineffective-assistance claim against his appellate counsel, he should have raised any such claim in his 1988 cross-appeal to this court. *See Gillard III,* 78 Ohio St.3d at 549, 679 N.E.2d at 279. In that proceeding, Gillard was represented by different counsel. Hence, there was no obstacle to his presenting to us any ineffective-assistance claim he may have had.[2] Cf. *State v. Lentz* (1994), 70 Ohio St.3d 527, 529-530, 639 N.E.2d 784, 785-786 (counsel cannot be expected to argue his own ineffectiveness).

The judgment of the court of appeals is therefore affirmed.

Judgment affirmed.

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[1] As we held in *Gillard III,* 78 Ohio St.3d at 550, 679 N.E.2d at 279-280, Gillard's counsel did not render ineffective assistance by failing to raise new issues in the court of appeals' 1990 proceedings on remand from *Gillard I,* as such issues were beyond the scope of the remand.

[2] Jack A. Blakeslee represented Gillard before the court of appeals in 1987. After the state obtained leave to appeal, we granted Blakeslee's motion to withdraw. We then appointed John N. Mackey and Kathleen O. Tatarsky to represent Gillard in this court. Five months after Blakeslee withdrew, Mackey and Tatarsky filed Gillard's delayed cross-appeal. Gillard's merit brief on cross-appeal was signed by Mackey and Tatarsky and filed nearly eight months after Blakeslee withdrew.

APPENDIX E

**IN THE COURT OF APPEALS FOR
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT**

CASE NOS.: 1997 CA00318 and 1997CA00410

[Filed June 22, 1998]

STATE OF OHIO	)
Plaintiff-Appellee	)
	)
-vs-	)
	)
JOHN GRANT GILLARD	)
Defendant-Appellant	)
	)

Civil Appeal from Common Pleas Court
Case No 1996CV01945

JUDGES: Hon. Sheila G. Farmer, P.J.; Hon. William B. Hoffman, J.; Hon. W. Don Reader, J.

OPINION

READER,J.:

Appellant John Grant Gillard appeals a judgment of the Stark County Common Pleas Court dismissing his Petition for Post-conviction Relief:

ASSIGNMENTS OF ERROR:

I. THE TRIAL COURT ERRED IN ITS DENIAL OF APPELLANT'S FIRST CLAIM FOR RELIEF IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION, AND *BRADY VS. MARYLAND*, 373 U.S. 82 (1963).

II. THE TRIAL COURT ERRED IN ITS DENIAL OF APPELLANT'S SECOND CLAIM FOR RELIEF IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION.

III. THE TRIAL COURT ERRED IN ITS DENIAL OF APPELLANT'S FOURTH CLAIM FOR RELIEF, IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 2, 5 AND 16 OF THE OHIO CONSTITUTION.

IV. THE TRIAL COURT ERRED IN DENYING APPELLANT'S THIRD CLAIM FOR RELIEF IN VIOLATION OF THE EIGHTH, AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 2, 9, 10, AND 16 OF THE OHIO CONSTITUTION.

V. THE TRIAL COURT ERRED IN ITS DENIAL OF AN EVIDENTIARY HEARING WHERE APPELLANT'S PETITION WAS FACIALLY SUFFICIENT TO RAISE AN ISSUE THAT APPELLANT'S CONVICTION IS VOID OR VOIDABLE.

VI. THE TRIAL COURT ERRED APPLYING THE DOCTRINE OF *RES JUDICATA* TO SOME OF APPELLANT'S CLAIMS FOR RELIEF, THUS VIOLATING HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, NINTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 1, 2, 9, 10, AND 16 OF THE OHIO CONSTITUTION.

VII. THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTS FOR DISCOVERY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, NINTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 1, 2, 9, 10, 16 AND 20 OF THE OHIO CONSTITUTION.

VIII. OHIO DOES NOT PROVIDE AN ADEQUATE CORRECTIVE PROCESS IN VIOLATION OF THE DUE PROCESS, THE EQUAL PROTECTION AND THE SUPREMACY CLAUSES OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 2, 10, 16 OF THE OHIO CONSTITUTION.

IX. THE CUMULATIVE ERROR OF APPELLANT'S SUBSTANTIVE CLAIMS MERIT REVERSAL OR REMAND FOR A PROPER POST-CONVICTION PROCESS.

On December 31, 1984, Timothy Hendricks had a New Year's Eve party at his house in Canton, Ohio. During the party, appellant's brother, William Gillard, got into a fight with Leroy Ensign, which resulted in Gillard being ejected from the residence. The party continued into the early morning of January 1, 1995, at which time the guests and their hosts settled in for the night.

Ron Postlethwaite awakened to the sound of gunshots outside the residence. He looked outside, and saw William Gillard shooting a gun into the air. Postlethwaite tried unsuccessfully to wake up Ensign. Postlethwaite then threw his body on top of his fiancé, Denise Maxwell, who was sleeping on the couch. Postlethwaite heard the door being kicked open, and people rushing into the house, followed by a gunshot. His head was jerked back by a man who put a gun to his head and fired. After shooting Postlethwaite, the gunman threw him to the floor, and shot Maxwell in the head. Postlethwaite recognized the shooter as appellant. He also saw Timothy Foehrenbach, one of appellant's accomplices, poke his head into the room.

Paramedics and police immediately responded to a 9-1-1 call. A Canton police officer asked Postlethwaite who shot him, and he responded, "Dirty John Gillard." Maxwell and Ensign were killed in the shooting.

After the shooting, appellant fled to West Virginia, staying at the home of Ron Webb. Appellant cut his hair and shaved his beard, and identified himself as "Butch Johnson."

Webb asked appellant about William Gillard's arrest in Canton for the shooting. Appellant responded, "I pulled the trigger, my brother is taking the fall."

Webb reported appellant's presence to local law enforcement authorities, who thereafter arrested appellant. Appellant again identified himself as "Butch Johnson." Appellant was transported back to Ohio by officers of the Canton Police Department.

Appellant was indicted for the capital murder of Leroy Ensign and Denise Maxwell, and the attempted aggravated murder of Postlethwaite. The case proceeded to jury trial in the Stark County Common Pleas Court. Appellant presented an alibi defense at trial, claiming that he attended a different party on the night in question, and then retired with his girlfriend, Jerri Oney, at her residence. Appellant was convicted as charged. After a mitigation sentencing hearing, appellant was sentenced to death for the killing of Ensign and Maxwell.

Appellant appealed the judgment of conviction to this court. This court reversed and remanded for new trial. *State v. Gillard* (January 21, 1987), Stark App. No. CA-6701, unreported. The Supreme Court of Ohio reversed this court's decision, reinstated appellant's convictions and non-capital sentences, and remanded the case to this court to review the proportionality and appropriateness of the sentence of death. *State vs. Gillard* (1988), 40 Ohio St.3d 226.

On remand, this court affirmed the sentences of death, finding that they were neither inappropriate under the facts and circumstances of the case, nor disproportionate with other death sentences from this district. *Gillard* (June 25, 1990), Stark App. No. CA-6701, unreported. On appeal to the Ohio

Supreme Court, the court found that appellant's trial counsel, Louis Martinez, might have labored under a conflict of interest in his representation, and remanded for a hearing to determine whether an actual conflict of interest existed. *Gillard* (1992), 64 Ohio St.3d 304.

On remand, the trial court found that an actual conflict of interest did not exist, and pursuant to the explicit instructions to the Supreme Court, returned the case to that court for further review. Upon review, the Ohio Supreme Court affirmed the decision, and affirmed the sentences of death. *Gillard* (1997), 78 Ohio St.3d 548.

Appellant thereafter filed the instant action pursuant to R.C. 2953.21 to vacate the judgments of conviction and sentence. The trial court summarily dismissed the petition without a hearing. Appellant appealed that decision to this court, which remanded to the trial court for further review of the record. After conducting such review, the court again dismissed the petition without a hearing. Appellant again appealed to this court, and we again remanded the case to the trial court for further review. The trial court dismissed the petition after the second remand, and appellant filed a second appeal. The last two appeals were consolidated for purposes of this appeal.

I.

Appellant argues that the court erred in summarily rejecting his claim that the State withheld exculpatory evidence in violation of *Brady vs. Maryland* (963), 373 U.S. 83.

The failure of the prosecution to disclose, upon request, evidence favorable to the accused violates the Fourteenth

Amendment's due process guarantee of a fair trial, when the evidence is material to either guilt or to punishment, irrespective of the good or bad faith of the prosecution. *Id.* at 87. Undisclosed evidence is material for purposes of the *Brady* rule only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States vs. Bagley* (1985), 473 U.S. 667, 682. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Appellant claims that the State improperly withheld Postlethwaite's statements to Guy Ensign, several taped interviews of Ronald Postlethwaite, an interview of Bill Gillard conducted at the Guemsey County Jail, a statement of Ronald Webb, and a statement of Donald Gorby. As to these items, appellant has not demonstrated their existence and possession by the State, nor has appellant demonstrated that any of these items contained exculpatory material evidence.

Appellant claims that the State improperly withheld statements of Tim Hendricks and Walter Lamb, and a police report containing a statement Postlethwaite made to Lamb, in which the witnesses claim that Postlethwaite told them "Gillard" was the shooter. Appellant claims this evidence is exculpatory, as he did not identify the shooters specifically as "John" Gillard, as apposed to his brother "William" Gillard. The statement that Gillard was the shooter, as opposed to John Gillard, is not exculpatory. Its value for impeachment purposes would have been marginal at best. The evidence is not material and exculpatory in nature.

Appellant argues that the State improperly withheld a statement of Johnny Morris, in which Morris says he spoke to Postlethwaite when he discovered the bodies. Appellant

claims this would have been useful for impeachment purposes, as Postlethwaite did not mention speaking to Morris. Again, this statement is of little impeachment value for Postlethwaite's testimony, as it does not relate to issues of guilt or innocence, and does not directly contradict any testimony.

Appellant argues that the State should have given him the police report containing Postlethwaite's statement to police that John Gillard shot him. Obviously, this evidence would be inculpatory in nature, rather than exculpatory, as it was consistent with Postlethwaite's testimony at trial.

Appellant argues that the State improperly withheld a taped interview of Postlethwaite in which he says that he was unaware of the details of the prior fight between William Gillard and Guy Ensign, and would have talk to other party goers to find out what happened. Appellant claims that this statement demonstrates that Postlethwaite relied on other party-goers for details as to what happened at the party. Postlethwaite's knowledge, or lack thereof, of the details of the fight appellant's brother had with Ensign is irrelevant to his identification of John Gillard as the man who shot him later in the evening. This was not material exculpatory evidence.

Appellant argues that the State should have disclosed a police interview with David Richey. Richey told police that William Gillard was trying to get out of town after the shooting, and called him after being arrested in an attempt to relay a message to appellant that he was in jail. Appellant argues that William Gillard's plan to flee provides evidence of his guilt, and corroborates appellant's story that he went to West Virginia for the purpose of getting Bill an attorney. This evidence is merely corroborative in nature, and is not

exculpatory. This statement was not material, as it did not directly relate to any of the issues concerning the shooting.

Appellant argues that the State should have disclosed a police statement of Tim Steph, which contradicted his trial testimony concerning a fight which took place in his bar, several weeks prior to the shooting, involving John Gillard. The statement had no relation to guilt or innocence, and its sole value would have been for impeachment purpose on an issue wholly collateral to the murders. Appellant has not demonstrated that this was material evidence.

Appellant argues that the State should have disclosed Polaroid photographs of appellant, which were taken in West Virginia, before his transportation back to Canton. Appellant argues that these photographs were relevant to his defense of misidentification of the shooter, as they would show what he looked like near the time of the shooting. The evidence at trial demonstrated that while in West Virginia, appellant changed his appearance by cutting is hair and shaving his beard. The photographs, therefore, would not have accurately reflected appellant's appearance on the day of the shooting, and could not have been used by appellant to demonstrate his appearance on January 1, 1985. In addition, appellant has not demonstrated that these photographs were in the possession of the State.

Appellant argues that the State improperly withheld a taped interview with Ronald Webb, in which he stated that he went to the police because appellant had the hots for his wife. Appellant has not demonstrated that this statement is exculpatory in nature. The evidence is of very minimal impeachment value, as it merely explains Webb's motivation for revealing Gillard's whereabouts to the police.

Appellant argues that the State withheld a police report containing statements of Tracie and Melissa Price, which supported his alibi. They told police that appellant and his girlfriend were at a New Year's party at their house until 5:00 A.M. The shooting took place at 4:45 A.M. Appellant has not demonstrated prejudice, as the Prices testified in his behalf in support of his alibi at trial. This evidence merely repeated the alibi evidence already within the possession of appellant. In addition, the Prices provided exculpatory evidence, as Tracie Price told police that he did not come forward with his alibi information because he believed that possibly the newspapers incorrectly reported the time of the shooting, and appellant was, in fact, guilty. In addition, Melissa Price told the police that she heard appellant talking about a fight with Leroy Ensign over a beating Ensign perpetrated upon a friend of his.

Finally, appellant argues that the State improperly withheld a letter to Tim Hendricks from the Canton Law Department, regarding problems with Hendricks' threatening witnesses in the case. This letter was not in any way exculpatory.

The first Assignment of Error is overruled.

II.

In his second Assignment of Error, appellant argues that counsel was ineffective for failing to request the appointment of an expert in eyewitness identification, and for failing to request a jury instruction concerning the potential unreliability of eyewitness testimony.

In order to demonstrate that counsel was ineffective, the defendant must show that counsel's performance fell below an objective standard of reasonable representation, and he was

prejudiced by such performance. *Strickland vs. Washington* (1984), 466 U.S. 668; *State vs. Bradley* (1989), 42 Ohio St.3d 136, *cert. denied*, (1990), 497 U.S. 1011. To demonstrate prejudice, the defendant must show that had counsel not erred, there is a reasonable probability that the result of the proceeding would have been different. *Id.*

Appointment of Expert: Appellant retained trial counsel. Therefore, it is not clear that appellant would have been entitled to the appointment of an expert at State expense, as he was not indigent. Further, the expert testimony concerning credibility of identification testimony of a particular witness is inadmissible under Evid.R. 702, absent a showing that the witness suffers from a mental or physical impairment which would affect the witness' ability to observe or recall events. *E.g.*, *State vs. Buell* (1986), 22 Ohio St.3d 124, paragraph two of the syllabus, *cert. denied*, (1986), 479 U.S. 871. Therefore, it is doubtful that expert testimony would have been admissible on the issue of eyewitness identification. Further, had such testimony been presented, appellant has not demonstrated that he would have been acquitted. Postlethwaite knew both appellant and his brother for a period of time before the incident in question. Therefore, this is not a case of a stranger identification, under the stress of a traumatic incident, but rather, an identification by a person familiar with appellant.

Jury Instruction: Under the doctrine of *res judicata*, a final judgment of conviction bars a defendant from raising and litigating in any proceeding except an appeal from that judgment, any defense or claimed lack of due process that was raised, or could have been raised, by the defendant at trial, or on direct appeal. *State vs. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus. Since appellant could have challenged the failure to give the proposed jury

instruction by way of an ineffective assistance of counsel claim on direct appeal, the claim is clearly *res judicata*. Appellant attempts to circumvent this rule by claiming that he is relying on evidence outside of the record. This is without merit. Appellant clearly could have raised this issue on direct appeal, as a determination concerning jury instructions could have been made based solely upon the record on appeal. Counsel's ineffectiveness for failing to request an instruction also could be determined solely on the record or direct appeal.

The second Assignment of Error is overruled.

III.

Appellant argues that the excessive security measures utilized by the trial court during the original trial stripped his of his presumption of innocence, thereby denying him a fair trial.

In order to show that a defendant was denied a fair trial as a result of the security measures adopted by the trial court, the defendant must demonstrate that the measures were either inherently prejudicial, or caused actual prejudice. *Holbrook vs. Flynn* (1986), 475 U.S. 560, 569. The court positioned one uniformed and armed police officer behind appellant throughout the trial, while another office sat between appellant and the trial judge. Appellant has made no demonstration of actual prejudice, nor has he demonstrated that the measures were inherently prejudicial. This was a death penalty case, and a jury would reasonably expect minimal security measures in the courtroom. Further, appellant could have raised this issue at trial, or on direct appeal, and the issue is, therefore, *res judicata*.

The third Assignment of Error is overruled.

IV.

Appellant argues that the court erred in summarily rejecting his claim that death by electrocution is cruel and unusual punishment.

This claim is *res judicata*, as appellant could have challenged the method of execution on direct appeal to the Court of Appeals or the Ohio Supreme Court.

Appellant argues that under evolving standards of decency, this claim is now cognizable for the first time in this post-conviction proceeding. Appellant bases this argument on his conclusion that four Justices of the United States Supreme Court expressed views in March of this year that the question of death by electrocution should be reviewed under contemporary standards. *Remeta vs. Florida* (March 30, 1998), 1998 WL 141409. However, neither the Ohio Supreme Court, nor the United States Supreme Court has undertaken to change the long-standing precedent that death by electrocution is not cruel and unusual. *E.g.*, *In Re: Kemmler* (1890); 136 U.S. 436; *State of Louisiana, ex rel. Francis vs. Resweber* (1947), 329 U.S. 459, 467; *Glass vs. Louisiana* (1985), 471 U.S. 1080, 1081.

The fourth Assignment of Error is overruled.

V.

Appellant argues that the court erred in failing to afford him an evidentiary hearing on his petition for post-conviction relief. Appellant argues that the claims raised in the petition, and argued in this appeal, warranted a hearing.

R.C. 2953.21(C) provides that before granting a hearing, the court shall determine whether there are substantive grounds for relief. The petition bears the burden of specifically demonstrating prejudice, before a hearing is warranted. *E.g.*, *State vs. Jackson* (1980), 64 Ohio St.2d 107, In addition, the claims must rely upon evidence outside the record in order to avoid the doctrine of *res judicata*, as outlined in *Perry*, *supra*.

Appellant did not satisfy the burden of providing sufficient evidentiary materials to establish that his claims were meritorious, thereby warranting a hearing. None of the appellant's claims, if factually true, have legal merit. First, as discussed in Assignment of Error I, above, appellant did not make the requisite showing that *Brady* evidence existed, and was not disclosed to appellant during trial proceedings. As discussed in Assignment of Error II., appellant did not make the requisite showing of ineffective assistance of counsel pursuant to *Strickland*, concerning the appointment of an expert on eyewitness identification. The issue of failure to request a jury instruction is clearly *res judicata*. Appellant failed to make a showing that excessive security denied him a fair trial. Electrocution is not cruel and unusual punishment as a matter of law. As appellant failed to meet the threshold burden of asserting claims that, if true, would entitle him to the requested relief.

The fifth Assignment of Error is overruled.

VI.

Appellant argues that the court incorrectly applied the doctrine of *res judicata* to the instant case. Appellant also argues that the defense of *res judicata* cannot be raised in the context of a Civ.R. 12(B)(6) motion to dismiss.

As discussed in previous Assignments of Error, the court properly applied the doctrine of *res judicata* to many of appellant's claims.

Although the doctrine of *res judicata* may not be used as a grounds for a Civ.R. 12(B) motion to dismiss, it is a proper basis for a court to find that a defendant has failed to state a claim upon which relief can be granted in an R.C. 2953.21(C) proceeding. *State vs. Joseph* (July 17, 1997), Allen App. No 1-96-90, unreported. Although a motion for post-conviction relief is a civil case, the case is peculiarly governed by the statutory procedure set out in R.C. 2953.21. Unlike an ordinary civil lawsuit, the defendant is required to support his claims for relief with evidentiary material at the time he files the petition. Therefore, unlike a civil case, where the court has before it only the complaint on a motion to dismiss, the court reviewing a post-conviction relief petition has before it evidentiary material and the record, from which it is required to make a determination was to the necessity of a hearing. The defense of *res judicata* is, therefore, proper basis for dismissal of a claim pursuant to R.C. 2953.21(C).

The sixth Assignment of Error is overruled.

VII.

Appellant argues that the court erred in failing to provide him with discovery beyond that required by Crim.R. 16, and in accordance with the broad discovery provisions accorded by the Civil Rules. R.C. 2953.21(C) expressly provided that the initial determination of whether a post-conviction petition states substantive grounds for relief is to be made based upon the petition and any supporting affidavits, together with the case files and records. Therefore, a petitioner for post-conviction relief is not entitled to discovery during the initial

stages of a post-conviction proceedings. *State vs. Loza* (October 13, 1997), Butler App. No. CA96-10-214, unreported, page 6. Accord, *State vs Benner* (August 27, 1997), Summit App. No. 18094, unreported; *State v. Poindexter* (August 29, 1997), Hamilton App. No. C-960780, unreported; *State vs. Webb* (October 20, 1997), Clermont App. No. CA96-12-108, unreported.

The seventh Assignment of Error is overruled.

VIII.

Appellant argues that Ohio's post-conviction relief scheme, embodied in R.C. 2953.21 *et seq.*, is unconstitutional, as it does not provide capital petitioners with adequate safeguards of review. Appellant reasons that the remedy must be inadequate, as relief is rarely, if ever, granted.

Appellant has not gone beyond mere conclusory allegations that the process is inadequate. Appellant has not demonstrated that Ohio's post-conviction relief scheme is unconstitutional. *See*, *State vs. Sklenar* (1991), 71 Ohio App.3d 444, 449 (R.C. 2953.21 is not unconstitutional); *State vs. Fox* (May 16, 1997), Wood App. No. WD-96-031, unreported (claim that post-conviction relief statute is inadequate, as relief is never granted, is not well-taken).

The eighth Assignment of Error is overruled.

IX.

Appellant argues that the cumulative effect of the alleged errors outlined in his brief warrant the reversal of the trial court's judgment, and a remand to the trial court for further

proceedings. As none of appellant's claims has legal merit, the cumulative effect argument is facially without merit.

The ninth Assignment of Error is overruled.

The judgment of the Stark County Common Pleas Court is affirmed.

By: Reader, J.
Farmer, P.J. and
Hoffman, J. Concur.

/s/ W. Don Reader

/s/ Sheila G. Farmer

/s/ William B. Hoffman

JUDGES

APPENDIX F

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

Case No. CA-6701

[Filed April 27, 1998]

STATE OF OHIO	)
Plaintiff-Appellee	)
	)
-vs-	)
	)
JOHN GRANT GILLARD	)
Defendant-Appellant	)
	)

Criminal appeal from the
Stark County Court of Common Pleas
Case No. 85-5023

JUDGES: Hon, Shelia G. Farmer, P.J.; Hon. W. Scott Gwin, J.; Hon. William B. Hoffman, J.

OPINION

Gwin, J.

Defendant John Grant Gillard appeals a judgmeat of the Court of Common Pleas of Stark County, Ohio, which

convicted him on two counts of aggravated murder, attempted aggravated murder, and aggravated burglary. The trial court sentenced appellant to death.

The action comes before us upon appellant's motion to reopen his appeal pursuant to App. R. 26(B) and *State v. Murnahan* (1992), 63 Ohio St. 3d 60. Thus our initial analysis in this case requires we determine whether the case is properly before us.

ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. I

THE EVIDENCE IN APPELLANT GILLARD'S CASE WAS NOT SUFFICIENT TO SUPPORT HIS CONVICTIONS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 9 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR NO. II

APPELLANT GILLARD WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DURING ALL PHASES OF HIS PROCEEDINGS

ASSIGNMENT OF ERROR NO. III

THE PROSECUTOR'S MISCONDUCT IN THE TRIAL PHASE DENIED APPELLANT GILLARD HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

ASSIGNMENT OF ERROR NO. IV

THE TRIAL COURT ERRORS DURING APPELLANT'S TRIAL VIOLATED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, NINTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

ASSIGNMENT OF ERROR NO. V

THE APPEARANCE OF JUDICIAL BIAS AND IMPROPRIETY DENIED APPELLANT GILLARD A FAIR TRIAL.

ASSIGNMENT OF ERROR NO. VI

THE DEATH SENTENCE IS INAPPROPRIATE AND UNRELIABLE WHEN *VOIR DIRE* ERRORS DENY A CAPITAL DEFENDANT A FAIR TRIAL AND A FAIR JURY.

ASSIGNMENT OR ERROR NO. VII.

WHEN A TRIAL COURT RELEASES GRAND JURY TRANSCRIPTS TO THE STATE TO AID IN PREPARATION OF AN APPEAL, THE COURT MUST RELEASE THE TRANSCRIPTS TO THE DEFENSE AND MAKE THE TRANSCRIPTS A PART OF THE RECORD ON APPEAL.

ASSIGNMENT OR ERROR NO. VIII

THE COURT HAS DENIED APPELLANT THE OPPORTUNITY TO FILE AN ADEQUATE BRIEF

DEPRIVING IN VIOLATION OF THE FOURTEENTH AMENDMENT.

In *Murnahan*, *supra*, the Ohio Supreme Court held:

> Where the time period for reconsideration in the court of appeals on direct appeal to the Supreme Court has expired, a delayed claim of ineffective assistance of appellate counsel must first be brought in an application for delayed reconsideration in the court of appeals where the alleged error took place, pursuant to App. R. 26 and App. R. 14(B), and if delayed reconsideration is denied then the defendant may filed for delayed appeal in the Supreme Court, pursuant to Section 8, Rule II. of the Rules of Practice of the Supreme Court.
>
> Syllabus by the court, paragraph three.

In 1993, App. R. 26 was amended in response to *Murnahan*, *supra*. Prior to *Murnahan*, App. R. 26 permitted applications for reconsideration to be filed within ten days of the journalization or announcement of the appellate decision. The *Murnahan* court found claims of ineffective assistance of appellate counsel may be left undiscovered because of the inadequacy of appellate counsel or the inability to identify counsel's errors within the time allowed for reconsideration. For this reason, *Murnahan* provided for a delayed reconsideration. App.R. 26 was amended to provide for reconsideration in criminal cases beyond the previous limitation of time, but only in alleged instances of ineffective assistance of counsel in the direct appeal, not in post-conviction proceedings. App.R. 26 now provides for applications to be filed more than 90 days after the appellate

court's judgment is journalized if the appellant can show good cause.

For the purposes of App. R. 26, the term "ineffective assistance of counsel" is intended to comprise the two prongs set forth in the United States Supreme Court case of *Strickland v. Washington* (1984), 466 U.S. 668. In order to show ineffective assistance of counsel, the accused must show both that counsel was deficient in the representation, and also that the deficiency actually prejudiced the accused's ability to receive a fair and reliable trial. Ohio uses the *Strickland* standard to review claims of ineffective assistance of counsel, *see State v. Bradley* (1989), 42 Ohio St. 3d 136.

Thus before us, appellant here must show both that his appellate counsel was ineffective in failing to raise issues before us, and appellant must also show that the ineffective assistance of appellate counsel and the prior appellate proceedings prevented these errors from being presented effectively to this court. To do so, the appellant must prove there exists a reasonable probability that, but for appellate counsel's ineffectiveness, the result of the appeal would have been different. Otherwise, the ordinary principles of *res judicata* are applicable, *see Murnahan, supra,* at 66.

A review of the history of the case is most pertinent. On March 11, 1985, appellant was indicted on four counts of aggravated murder with specifications, two counts of attempted aggravated murder, and one count of aggravated burglary, each with a firearms specification. Appellant was convicted on June 12, 1985, and on June 17, 1985 the jury returned its verdict recommending the death penalty. On June 19, 1985, the trial court accepted the jury's recommendation.

The case then came for the first time before this court, and we reversed the convictions and sentences because we found errors in the guilt phase of the trial. We remanded the case for a new trial, *see State v. Gillard* (January 21, 1987), Stark Appellate #6701, unreported. Because we reversed appellant's conviction and sentence, we did not perform the statutorily required appropriateness and proportionality review. The Ohio Supreme Court granted the State's leave to appeal our judgment, reversed our judgment, and reinstated the appellant's convictions in *State v. Gillard* (1989), 40 Ohio St. 3d 226, hereinafter *Gillard I.* The Supreme Court remanded appellant's case to us to perform the appropriateness and proportionality review.

In *State v. Gillard* (June 25, 1990), Stark Appellate #CA-6701, unreported, this court affirmed appellant's death sentence. The matter then returned to the Ohio Supreme Court for its review.

At this point, a new twist arose. In *State v. Gillard* (1992), 64 Ohio St. 3d 304, hereinafter *Gillard II*, the Ohio Supreme Court found the attorney who represented appellant had a possible conflict of interest in representing him, and remanded the matter to determine whether the initial joint representation of appellant and his brother, who was implicated in the crime, placed the attorney in a conflict of interest. The Ohio Supreme Court noted:

> Although appellant has never previously raised this issue, we have decided to ask the question because of the possibility that appellant has been denied his most fundamental constitutional rights under Fifth and Sixth Amendments of the United States Constitution. Where, as here, a possible violation of due process and the right to counsel exists, we are not only

> empowered to consider the question, but it is our duty to do so as court of last resort.
>
> *Gillard, II, at 306.*

The Supreme Court in *Gillard, II*, remanded the matter to the trial court for a hearing on the issue of whether appellant's counsel had an actual conflict of interest in representing appellant and his brother. The Supreme Court did not perform its independent review of the appropriateness and proportionality of the death sentence required by R.C. 2929.05(A) at that time. Instead, the Supreme Court instructed the trial court to conduct a hearing on the issue of actual conflict of interest. If, upon remand, the trial court found there was an actual conflict of interest, the court was directed to conduct a new trial. In the alternative, the Supreme Court held if the trial court determined no actual conflict of interest existed, then the trial court must return the cause to the Supreme Court so it could complete the statutorily mandated review. *Gillard II*, at 312.

Upon remand, the trial court conducted a review on issue of whether an actual conflict of interest existed in Attorney Louis Martinez representing appellant and his brother. The court noted both John Gillard and his brother William testified in the defense case in chief in the guilt phase of the trial William's testimony was consistent with, and corroborated appellant's testimony and supported appellant's alibi defense. The trial court specifically found the testimony was complimentary, and contained a common theme that neither was involved in the incident and that the prosecution witnesses were not credible and were not truthful. The trial court found the defense was well planned, well executed, and competent. While appellant maintained in the hearing that the best defense strategy should have been to present John

Gillard's alibi coupled with a suggestion to the jury that most of the State's evidence implicated William, the trial court found Mr. Martinez used a sound trial strategy in simply asserting neither appellant or his brother was involved the incident. The trial court concluded because there was no defense in this matter wherein one brother assigned blame to the other, but rather there was common interest in attacking the credibility of the prosecution witnesses, no actual conflict of interest existed.

The matter was appealed to this court, and we found in *State v. Gillard* (December 13, 1995), Stark Appellate #95CA2057, unreported, that we had no jurisdiction to review the matter. Instead, the express instructions of the Ohio Supreme Court were to return the matter directly to the Supreme Court of Ohio for its proportionality and appropriateness review.

Thereupon, the Ohio Supreme Court took the appeal for the third time. In *State v. Gillard* (1997), 78 Ohio St. 3d 548, hereinafter *Gillard III*, the Ohio Supreme Court found the aggravating circumstances outweighed any mitigation, and also found no actual conflict of interest resulted from Mr. Martinez's presentation of appellant and his brother. The Supreme Court concluded in *Gillard III*, the death penalty was appropriate and proportionate. A strong dissent in *Gillard* asserts there was an actual conflict of interest because Martinez's joint representation of John and Willard influenced Martinez's overall defense strategy, and led him to choose a straight alibi defense rather than an alibi/alternative suspect defense.

Against this backdrop, we must review whether the motion to re-open this appeal was made timely, or if, although untimely, there is good cause for the delay. Helpful

to an analysis is the Supreme Court's opinion in *State v. Cole* (1982), 2 Ohio St. 3d 112. In *Cole*, the Ohio Supreme Court reviewed whether *res judicata* barred appellant from raising the issue of effective assistance of trial counsel in a post-conviction relief petition. While not directly on point, nevertheless, *Cole* is extremely helpful in directing our approach here. In *Cole*, the Supreme Court noted the doctrine of *res judicata* provides a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or claim or lack of due process which was raised or could have been raised, *Cole* at 113, citations deleted. The *Cole* court cited *State v. Carter* (1973), 36 Ohio Misc. 170, with approval. Carter held that counsel cannot realistically be expected to argue his own incompetence, and for this reason, *res judicata* does not act to bar a defendant represented by the same counsel at trial and upon direct appeal from raising a claim of ineffective assistance of counsel in a petition for post-conviction relief.

Although *State v. Cole* is an older case, we find its rationale is still applicable. Thus, in addition to charting the procedural history, we also trace the history of appellant's representation over the years.

As we noted *supra*, Louis Martinez, Esquire and Craig Chessler, Esquire represented appellant during the original trial in this matter in 1985. When the matter came before us in 1986 - 1987, Jack Blakeslee, Esquire was counsel of record. The record on appeal, at least at this late date, does not demonstrate whether Mr. Blakeslee had co-counsel before us. In the Supreme Court case in *Gillard, I*, counsel for appellant were John Mackey, Esquire and Kathlee Tatarsky, Esquire. Mr. Mackey and Ms. Tatarsky also represented appellant when the cause was remanded to our court to

conduct a proportionality review. It appears from the record the Public Defender's Office became involved in the case went back to the Supreme Court in *Gillard, II*, and the Public Defender's Office has continued its representation to this day. Unfortunately, the record before us contains some gaps, undoubtedly because of the passage of time and the numerous trips the case file has made between the various courts which have reviewed it.

Reviewing the history of case, and the history of representation, we find appellant was not required to raise the issue of ineffective assistance of appellate counsel, in *Gillard I*, because Mr. Blakeslee was successful in our court, and Mr. Mackey and Ms. Tatarsky were defending our judgment before the Supreme Court. When the Supreme Court reversed and remanded the matter in *Gillard I*, the matter was remanded to us for the limited purpose of performing our statutory independent review of the appropriateness and proportionality of the death penalty. It would have been inappropriate to raise ineffective assistance of appellate counsel at the stage of the trial, because the Ohio Supreme Court remand was for a limited purpose.

When the Public Defender became involved prior to the Supreme Court's pronouncement in *Gillard, II*, the Public Defender not only appealed our decision in the proportionality and appropriateness review, but also raised the issue of whether trial counsel had a possible conflict of interest, which was an admittedly new issue for the first time in the case's second appearance before the Supreme Court. The Supreme Court found it was appropriate to examine this issue because it dealt with appellant's most fundamental constitutional rights, and because the Supreme Court was, at this point, functioning as the court of last resort for this appellant, who had been sentenced to die.

We find the issue of the effectiveness of appellate counsel should have been raised in *Gillard, II*. Nevertheless, cognizant of the Supreme Court sentiments expressed on the issue of trial counsel's conflict of interest, we find in this capital case although the matter may have been raised in an untimely fashion, there is nevertheless good cause to review appellant's claims if we otherwise have jurisdiction to do so.

The Supreme Court's most recent pronouncement, announced June 11, 1997, *Gillard, III* reviewed the trial court's determination there was no actual conflict of interest in trial counsel's representation of appellant and his brother. The Supreme Court affirmed that decision, and then proceeded to perform its independent review pursuant to R.C. 2929.05. The Supreme Court expressly found its duty was to determine whether the evidence supported the jury's finding of aggravating circumstances, to re-weigh the aggravating circumstances against the mitigating factors, and to determine whether the death sentence is proportionate compared to other similar cases. The Supreme Court affirmed appellant's sentence of death.

Less than three weeks later, appellant filed this application for re-opening pursuant to App. R. 26 (B). Pursuant to *Murnahan, supra*, this court may review a case after the time for appeal has run if appellant demonstrates appellate counsel was ineffective in failing to assign errors in the first appeal, which, had they been raised, would have resulted in a reversal of the case. The matter is compounded, of course, by the fact that this court did in fact reverse *Gillard I*, only to be reversed in our turn by the Ohio Supreme Court. It is difficult to conceive how this court can find Mr. Blakeslee should have been more effective especially given the number of times this case has been subjected to judicial scrutiny after Mr.

Blakeslee's representation ended and other counsel in turn represented appellant.

Notwithstanding these conceptual problems, we have reviewed the appendix to the Supreme Court's opinion in *Gillard III*, at 563-565. We have compared appellant's assignments of error one through seven to the propositions of law which appellant raised in his appeal in *Gillard III*, and we find the first seven assignments of error before us were raised before the Ohio Supreme Court. We also note the Ohio Supreme Court did not discuss the particular propositions of law which correspond to appellant's present assignments of error one through seven.

In *Gillard II*, when the Supreme Court perceived a potential new issue, that of Mr. Martinez's conflict of interest, the court refrained from completing its proportionality and appropriateness review, and remanded the matter for resolution. Here, the Supreme Court did not remand the issues, nor did it refrain from entering a final judgment. This court cannot assume jurisdiction over this matter given the state of this record.

We find the principles or *res judicata* bar appellant's raising of these assignments of error before us. We can only presume on the state of this record the Supreme Court was fully cognizant of these alleged errors when it affirmed appellant's death sentence. Although the Supreme Court did not specifically address these assignments of error, that is not a matter appropriate for this court's comment, and we find the Supreme Court's opinion in *Gillard III* disposes of assignments of error one through seven.

Finally, with regards to appellant's assignment of error eight, appellant moved this court pursuant to Loc. R. 9(B) for

leave to file a brief in excess of 30 pages. This court granted leave on October 21, 1997, but directed the brief should not exceed 50 pages. Appellant now complains 50 pages was insufficient to fully develop his arguments before us. However, the record does not demonstrate appellant ever brought this matter to our attention by means of another motion. Thus, we were prohibited from affording appellant the relief requested. Further, we find appellant's brief developed the issues he raises, not just adequately but eloquently.

Because we find assignments of error one through seven are barred by the principles of *res judicata*, it follows that assignment of error eight is moot.

For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed. It is ordered a special mandate issue out of this court directing the Court of Common Pleas to carry its judgment into execution.

By Gwin, J.,
Farmer, P.J., concurs,
Hoffman, J., dissents

/s/ _____

/s/ _____

JUDGES

Hoffman, J., dissenting

I respectfully dissent from the majority opinion. I do so because I would dismiss this appeal as being improvidently allowed. My reasons follow.

I find appellant's Application For Reopening to be untimely filed under App. R. 26(B)(1). Such application must be filed within ninety days from journalization of the appellate judgment unless good cause for filing at a later time is shown. The ninety day provision set forth in App.R. 26(B)(1) became effective on July 1, 1993, more than six years after the Court's first opinion. However, an applicant who seeks to reopen an appellate judgment journalized before July 1, 1993 may not simply rely on the fact App. R. 26(B)(1) did not exist within the ninety days following journalization of the appellate judgment, but must show good cause why he or she did not attempt to invoke the procedures available under former App. R. 26 and 14(B). *See*, *State v. Reddick*, (1995), 72 Ohio St.3d 88 and *State v. Wickline* (1996), 74 Ohio St.3d 369.

This Court's first appellate judgment was filed January 21, 1987. I concede any delay in appellant's not filing an application for reopening within ninety days, at that time, would be for good cause since this Court reversed appellant's conviction and sentence. However, upon the Ohio Supreme Court's reversal of this Court's decision on the merits of appellant's conviction as filed on October 26, 1988, such good cause was eliminated. The Ohio Supreme Court's remand to this Court to perform an independent review of the appropriateness and proportionality of the death penalty did not preclude such an application. Appellant's Application for Reopening was filed on July 7, 1997, more than a 8 ½ years after the Ohio Supreme Court's decision reinstating appellant's conviction.

Even if appellant did have the same appellate counsel during his first appeal to the Ohio Supreme Court, such fact does not, in and of itself, demonstrate good cause for the delay in failing an application for reopening under App. R. 26(B). Appellant asserts such proposition in his Application for Reopening filed in this Court and cites *State v. Cole* (1982), 2 Ohio St.3d 112, in support. Upon review of *Cole*, I find it stands for the proposition that similarity of counsel bars application of the doctrine of *res judicata*. It does not address reasonableness of delay in raising the question of ineffectiveness of trial counsel or, as analogous here, appellate counsel. In *Cole*, there was no time limit for raising claims under R.C. 2953.21 (Petition for Post Conviction Relief) then existing. Timeliness or good cause for delay was not an issue in *Cole*.

I also note that according to the listing of counsel of record in the official reporting of all of appellant's appeals, no commonality of counsel exists. In the first appeal to this Court, Attorney Blakeslee is counsel of record. In the first appeal of this Court's decision to the Ohio Supreme Court, Attorneys Mackey and Tatarsky are counsel of record.

Contrary to appellant's claim in his Application for Reopening, I find appellant did have a new or, at a minimum, additional appellate counsel in the Supreme Court than he did at the Court of Appeals in the person of Kathleen Tatarsky. Even if Mr. Mackey was co-counsel in the first appeal to this court and remained as co-counsel during the first appeal to the Ohio Supreme Court (as asserted in appellant's Application for Reopening), clearly Ms. Tatarsky was new appellate counsel and could have raised any claims of ineffectiveness of appellate counsel during this first appeal to the Ohio Supreme Court. Though the status of Mr. Mackey and Ms. Tatarsky was that of counsel for appellee in the first appeal to the Ohio

Supreme Court, they nevertheless did file a cross-appeal. Claims asserting ineffective assistance of appellate counsel in capital cases must be raised in the first appeal as of right in the Supreme Court of Ohio unless, because of unusual circumstances, application of the doctrine of *res judicata* would be unjust. *State v. Williams* (1996), 74 Ohio St.3d 454. If the previous appellate representation was, in fact, as portrayed by present appellate counsel in the Application for Reopening, such arguably could constitute sufficient "unusual circumstances" so as not to invoke *res judicata* because Mr. Mackey and Ms. Tatarsky were associates in the same law firm at that time.

In addition, appellant's present counsel, the Office of the Ohio Public Defender, was counsel of record before June 2, 1992, the date *State v. Gillard* (1992), 64 Ohio St.3d 304, was submitted for decision. Present appellate counsel was able to raise a new issue as to trial counsel's conflict of interest for the first time therein. Obviously, such claim, being a new one, would demonstrate ineffectiveness of appellate counsel in failing to have previously raised that issue at the appellate level. As noted by the majority, present appellate counsel did present the claims now asserted at the same time it first raised the issue of trial counsel's conflict of interest in the Supreme Court. The fact the Ohio Supreme Court did not address those other claims at the time *may* give rise to *res judicata* implications. It is clear the Ohio Supreme Court's decision in *Gillard III* did not address these claims. As such, any decision as to whether or not *Gillard III* bars consideration of appellant's present claims on the basis of *res judicata* is best left for the Ohio Supreme Court to determine. For this court to so determine now may be both premature and presumptuous. "Article IV of the Ohio Constitution designates a system of 'superior' and 'inferior' courts, each possessing a distinct function. The Constitution does not grant to a court

of common pleas jurisdiction to review a prior mandate of a court of appeals." *State, ex rel. Potain v. Mathews* (1979), 59 Ohio St.2d. 29. Likewise, this Court should be reluctant to determine the scope or effect of *Gillard III* as to issues not addressed therein. This Court recently took the position in *Fairchild v. Curtis* (March 5, 1998), Guemsey App. No. 96CA33, unreported, that an issues raised in a subsequent appeal, which was previously raised in a prior appeal, was subject to our appellate review because the issue was not addressed by this Court in the prior appeal. We did not find *res judicata* or law of the case principles prevented our appellate review in the subsequent appeal.

Nevertheless, nothing prevented present appellate counsel from filing the instant application for reopening from that time (June 2, 1992) until July 7, 1997, a period of over 5 years. The fact that present appellate counsel was successful in securing a remand by the Ohio Supreme Court to the trial court on the new issue of trial counsel's conflict of interest, did not preclude or prevent it from filing the instant Application For Reopening sooner. Although this Court would have been without jurisdiction to rule on such application during the pendency of the various appeals to the Ohio Supreme Court[1] (in the absence of an order of limited remand from the Ohio Supreme Court), such does not excuse the failure to timely file such application in this Court.

For all the foregoing reasons, I find appellant's near 9 year delay in filing his Application For Reopening untimely. For a similar result *see*, *State v. Williams*, *supra* (10 year delay); *State v. Peeples* (1995), 73 Ohio St.3d 149 (almost 7

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[1] *State v. Howe* (1995), 73 Ohio St.3d 35.

year delay); and *State v. Michael* (1996), 114 Ohio App.3d 523 (5 year delay).

/s/ William B. Hoffman
JUDGE WILLIAM B. HOFFMAN

APPENDIX G

SUPREME COURT OF OHIO

No. 96-221

[Filed June 11, 1997]

The State of Ohio,	)
Appellee	)
	)
v.	)
	)
Gillard,	)
Appellant.	)
	)

JUDGES: DOUGLAS, F.E. SWEENEY and PFEIFER, JJ., concur. RESNICK, J., concurs in judgment only. MOYER, C.J., and LUNDBERG STRATTON, J., dissent.

OPINION

COOK, J. Given our determination in *Gillard II*, the tasks remaining in this case include a review of the issue of the alleged conflict of interest of appellant's trial counsel and our own independent review of the appropriateness and proportionality of the death sentences pursuant to R.C. 2929.05(A). Although appellant challenges his convictions and sentence, these propositions of law present issues beyond the scope of the *Gillard II* remand and, as such, are beyond the scope of our current review. Further, appellant failed to

raise these issues in his 1998 cross-appeal when we affirmed his convictions and remanded the cause to the court of appeals. *See Gillard I, supra*. These new issues are barred by the doctrine of *res judicata* and we overrule propositions of law six, nine through thirteen, and fifteen without further consideration. *State v. D'Ambrosio* (1995), 73 Ohio St. 3d 141, 143, 652 N.E.2d 710, 713.

Appellant does raise additional matters that he has not had the prior opportunity to argue and which may not be barred by the doctrine of *res judicata*. Thus, although they are technically beyond the scope of the remand, we will consider appellant's challenges to the 1990 "resentencing" hearing of the trial court and to the effectiveness of his appellate counsel.

After the court of appeals affirmed the original death sentence, the appellate court issued a special mandate directing the common pleas court to "carry this judgment into execution." *State v. Gillard* (June 25, 1990), 1990 Ohio App. LEXIS 2664, Stark App. No. CA-6701, unreported. The common pleas court, in response to the mandate, held a hearing to set a new execution date, *not* to "resentence" appellant. At the hearing, the trial court had no authority to reopen the question of whether the appellant should receive the death sentence, and could not receive evidence or reweigh the aggravating circumstances against the mitigating factors. Accordingly, we overrule appellant's fourteenth proposition of law.

In his seventh proposition of law, appellant claims his appellate counsel in *Gillard I* was ineffective because only two issues were raised in his cross-appeal. *Gillard I*, however, was appellant's second appeal as of right (notably, a *claimed* appeal as of right). As such, appellant was not

entitled to effective assistance of appellate counsel. *State v. Buell* (1994), 70 Ohio St. 3d 1211, 1212, 639 N.E.2d 110.

In this same proposition, appellant also argues that he received ineffective assistance of appellate counsel in the court of appeals' proceedings on remand from *Gillard I* because counsel did not attempt to raise issues beyond the scope of the remand. Because counsel appropriately focused on the issues before the court on remand – that court's independent review of the sentence we overrule appellant's seventh proposition of law.[1]

We have previously held that R.C. 2929.05 does not require this court to address and discuss, in opinion form, each and every proposition of law raised in a capital case on appeal from the court of appeals. *See, e.g., State v. Davis* (1996), 76 Ohio St. 3d 107, 110, 666 N.E.2d 1099, 1104; *State v. Allen* (1995), 73 Ohio St. 3d 626, 628, 653 N.E.2d 675, 680. We thus address here only those issues that warrant discussion. For the reasons that follow, we find no actual conflict of interest in trial counsel's representation of appellant and affirm the judgment of the court of appeals as to both the convictions and sentence.

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[1] Appellant makes a related argument in his nineteenth proposition of law that he was denied "meaningful" appellate review because the court of appeals neither considered the mitigating factors nor independently reweighed the aggravating circumstances and mitigating factors. This court's independent review, however, will correct any errors by the court of appeals. *State v. Clark* (1988), 38 Ohio St. 3d 252, 263, 527 N.E.2d 844, 856.

I

CONFLICT OF INTEREST

Appellant contends that his trial counsel, Louis Martinez, labored under an actual conflict of interest because Martinez also represented William A. Gillard, appellant's brother. Martinez represented William when he pled no contest to and was found guilty of a misdemeanor for illegally discharging a firearm at the crime scene immediately prior to the murders. William was also under investigation by the grand jury during appellant's trial for his involvement in the murders.

At our direction, the trial court conducted a hearing to determine whether Martinez represented appellant under the cloud of an actual conflict of interest. Appellant presented testimony from three witnesses; Craig Chessler, co-counsel for appellant at trial; Don Wuertz, an investigator employed by Martinez during appellant's trial; and Charles Kirkwood, a retired professor of law. Martinez was unable to testify at the remand hearing, having suffered a stroke sometime after the trial.

The trial court concluded that Martinez did not represent appellant under an actual conflict of interest. Based on the limited nature of the remand by this court, the court of appeals dismissed appellant's appeal of the trial court's findings for lack of jurisdiction. *State v. Gillard* (Dec. 13, 1995), Stark App. No. 95CA0257, unreported.

A. Procedural Challenges

Appellant initially challenges this court's exercise of jurisdiction over the trial court's proceedings on remand absent the court of appeals' intermediate review. Appellant

argues in his first proposition of law that the court of appeals, not this court, has jurisdiction over direct appeals from common pleas courts pursuant to Section 3(B)(2), Article IV of the Ohio Constitution.[2] In this case, however, the decision of the trial court on the conflict issue is not returned to this court as "an appeal" from the trial court. This court never relinquished the jurisdiction acquired in *Gillard II*. By instructing the trial court in *Gillard II* to "*return* this cause" to this court, we retained our jurisdiction and remanded only the conflict issue for the limited purpose of conducting an evidentiary hearing. *See, also, State v. Berry* (1996), 77 Ohio St. 3d 1439, 671 N.E.2d 1279 (remand to trial court for competency hearing while retaining jurisdiction over matter); *see, generally*, 16 Wright, Miller & Cooper, Federal Practice & Procedure (1996) 700, Section 3937, (describing and approving federal courts' use of remand-while-retaining-jurisdiction procedural device). Because appellant had no right to appeal the conflict issue to the court of appeals, we overrule his first proposition of law.

In his second proposition of law, appellant challenges the remedy we fashioned in *Gillard II* for the trial court's failure to inquire into the possible conflict of interest during the original trial. Appellant contends that a new trial is the sole remedy for the trial court's failure to conduct an inquiry into

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[2] Section 3(B)(2), Article IV of the Ohio Constitution states:

> "Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district and shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies."

a potential conflict of interest at trial after the trial court has been alerted to one.

In support of his argument, appellant cites *Wood v. Georgia* (1981), 450 U.S. 261, 272, 101 S. Ct. 1097, 1104, 67 L. Ed. 2d 220, 231, fn. 18, where the court stated that the United States Constitution "*mandates* a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.'" (Emphasis added.) In *Wood*, the trial court failed to inquire into a possible conflict of interest after the court was alerted to its potential during a probation revocation hearing. Nonetheless, the *Wood* court ordered the trial court to "hold a hearing to determine whether the conflict of interest * * * actually existed * * *," rather than a new revocation hearing. Only "if the court finds that an actual conflict of interest existed" was it to grant a new revocation hearing. 450 U.S. at 273-274, 101 S. Ct. at 1104, 67 L. Ed. 2d at 231.

Additionally, the United States Constitution is violated by an actual conflict of interest, not a possible one. *Cuyler v. Sullivan* (1980), 446 U.S. 335, 348-350, 100 S. Ct. 1708, 1718-1719, 64 L. Ed. 2d 333, 346-347; *State v. Manross* (1988), 40 Ohio St. 3d 180, 182, 532 N.E.2d 735, 738. When a possible conflict of interest exists, a defendant is entitled only to an inquiry by the trial court. The trial court's failure to conduct the inquiry, however, does not transform a possible conflict into an actual one. A retrial for failing to inquire into a possible conflict of interest is premature. Rather, reversal is mandated only if an actual conflict is found. *See Brien v. United States* (C.A.1, 1982), 695 F.2d 10, 15, fn. 10; *United States v. Winkle* (C.A. 10, 1983), 722 F.2d 605, 611-612; *Bonin v. Vasquez* (D.C.Cal. 1992), 807 F. Supp. 589, 606, fn. 16. Appellant's second proposition of law is overruled.

In its opinion on the remand, the trial court indicated that it reviewed only parts of the original trial record. Appellant argues in his fifth proposition of law that, as a result, the trial court's factual findings are unreliable and that we should remand the issue for a complete review of the record. The facts surrounding the alleged conflict of interest were largely undisputed and the trial court did not need to review the entire trial record to properly reach its findings. In any event, whether an actual conflict of interest existed is a mixed question of law and fact, a subject to *de novo* review on appeal. *Cuyler*, 446 U.S. at 342, 100 S. Ct. at 1715, 64 L. Ed. 2d at 342; *Winkler v. Keane* (C.A.2, 1993), 7 F.3d 304, 308. Because the trial court is in a far better position to judge the credibility of the witnesses testifying at the remand hearing, its findings should be accepted unless clearly erroneous. *United States v. Gambino* (C.A.3, 1988), 864 F.2d 1064, 1071, fn. 3. We find no clear errors in the trial judges' findings. Appellant's fifth proposition of law is overruled.

B. Merits

In his third and eighth propositions of law, appellant challenges the trial court's finding on remand that no actual conflict existed in Martinez's representation of appellant. In order to establish a Sixth Amendment violation due to a conflict of interest, a defendant who failed to object at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler*, 446 U.S. at 348, 100 S. Ct. at 1718, 64 L. Ed. 2d at 346-347.

A *possible* conflict of interest exists where the "interests of the defendants *may* diverge at some point so as to place the attorney under inconsistent duties." (Emphasis added.) *State v. Dillon* (1995), 74 Ohio St. 3d 166, 168, 657 N.E.2d 273,

275-276, quoting *Cuyler*, 446 U.S. at 356, 100 S. Ct. at 1722, 64 L. Ed. 2d at 351-352, fn. 3. It follows, then, that an *actual* conflict of interest exists if, "during the course of the representation, the defendants' interests *do* diverge with respect to a material factual or legal issue or to a course of action." (Emphasis added.) *Id.* at 169, 657 N.E.2d at 276, quoting *Cuyler*, 446 U.S. at 356, 100 S. Ct. at 1722, 64 L. Ed. 2d at 351-352, fn. 3; *see, also, Winkler*, 7 F.3d at 307. Indeed, we have said that a lawyer represents conflicting interests "when, on behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose." *Manross*, 40 Ohio St. 3d at 182, 532 N.E.2d at 738.

Appellant contends that an actual conflict of interest in Martinez's representation of him and his brother, William, is apparent during appellant's trial because Martinez failed to use the evidence linking William to the murders to argue that William, and not appellant, committed them. Appellant cites the following evidence adduced at trail: William, armed with brass knuckles, attended a New Year's Eve party at the home of Tim Hendricks. William was evicted from the party after he and another partygoer, Leroy Ensign, got into a bloody fight. William returned to the Hendricks home and fired a gun outside the house minutes before the murders occurred there. William provided a false name to the police when he was apprehended several hours after the murders. When he was apprehended, William's shirt had blood stains that matched one victim, and his jacket had blood stains that could not be excluded as coming from another victim. William also possessed a bullet matching those found at the crime scene.

To demonstrate an actual conflict of interest based upon what an attorney has failed to do, appellant must show two elements. First, he must demonstrate that "some plausible alternative defense strategy or tactic might have been pursued.

He need not show that the alternative defense would necessarily have been successful if it had been used, but that it possessed sufficient substance to be a viable alternative. Second, he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." *United States v. Fahey* (C.A.1, 1985), 769 F.2d 829, 836; *see, also, Gambino*, 864 F.2d at 1070-1071; *Winkler*, 7 F.3d at 309.

Martinez, appellant maintains, could not argue that William committed the murders as part of appellant's defense due to Martinez's duty to protect William from future prosecution. Martinez's sole defense strategy was an alibi defense. To this end, appellant and three other witnesses testified that appellant was at a New Year's Eve party at the home of friends at the time of the murders. Martinez also called William as a defense witness. William denied firing a gun at the crime scene immediately prior to the murders and denied any involvement in the murders. He also denied speaking to or seeing appellant after William's fight with Ensign.

At the remand hearing, Professor Kirkwood testified that the viable defense Martinez should, but could not, have presented was an alibi *and* an alternate suspect defense. Under this theory, instead of solely arguing an alibi defense, Martinez should have also argued that William committed the murders. In Kirkwood's opinion, the circumstantial evidence pointing to William's involvement made the alternate suspect a viable, plausible defense.

At the remand hearing, appellant also introduced a plea agreement between the state and William dated two and one-half years after appellant's trial while William was represented by counsel other than Martinez. According to the

agreement, William pled guilty to the aggravated burglary of the Hendricks home, agreed to testify against appellant if appellant were to be retried and, in exchange, received probation for the offense. Appellant argues that the plea agreement demonstrates that the interests of appellant and his brother differed so that any attorney would have used William's involvement to exculpate appellant.

We disagree. We cannot say either that the alternative defense was viable or that Martinez's failure to argue, on behalf of appellant, that William was the "real killer" was due to Martinez's obligations to William. Although William may have been a plausible suspect, he was not an *alternative* suspect. Evidence of William's involvement was not inconsistent with appellant's guilt, *i.e.*, none of the evidence implicating William either negated appellant's involvement or strengthened his alibi.

To the contrary, the state claimed that *both* appellant and his brother were involved in the murders. For example, the state presented evidence that William's fight with Ensign provided appellant with the motive to kill Ensign. Additionally, the state called Ronald Webb, who testified that appellant confessed to him that "I pulled the trigger, and my brother's taking the fall." Moreover, both appellant *and* his brother were positively identified by the attempted-murder victim, Ronnie Postlethwaite. Postlethwaite testified that he saw William fire the shots outside Hendrick's house. Twenty minutes later, Postlethwaite heard more than one person enter the house and then heard a shot fired in the kitchen. Soon after, Postlethwaite testified, appellant grabbed his hair from behind, turned his head around and shot him in the temple. Postlethwaite then saw appellant shoot his fiancee, Denise Maxwell, in the head while she slept on the couch. While he lay wounded at the scene, Postlethwaite identified appellant to

the police as the shooter. Naturally, Postlethwaite's identification testimony and his credibility were crucial to the interests of *both* appellant and his brother.

If Martinez emphasized William's involvement in the murders, he would have conceded that the state's theory was in part correct. For example, by blaming William for the murders, Martinez risked substantiating Webb's testimony that William was "taking the fall" for appellant. Likewise, taking the position that William fired shots outside the murder scene that night would bolster the general credibility of Postlethwaite, the state's sōle identifying witness. If the jury believed the portion of Postlethwaite's testimony identifying appellant as the gunman, evidence of William's involvement would not assist appellant's defense. On the other hand, if the jury believed William's testimony that he did not fire shots on the night of the murders, the jury would have necessarily rejected Postlethwaite's identification of William and would be more likely to reject his identification of appellant. By attacking the state's evidence implicating William, Martinez undermined the state's case against appellant.

There is "no conflict of interest adversely affecting the attorney's performance at trial if an attorney at trial does not raise a defense on behalf of his client because to do so is not in that client's interest even though it is also in the interest of another client that it not be raised. To the contrary, that is a coincidence of interests." *Gambino*, 864 F.2d at 1071. We find here that Martinez labored under a coincidence of interests rather than an actual conflict of interests.

Contrary to appellant's assertions in his fourth proposition of law, neither the trial court nor this court engage in harmless error review by discussing the merits of Martinez's strategy. Discussion of the merits of Martinez's strategy is

relevant to whether an actual conflict adversely affected Martinez's performance at trail. Appellant placed the merits of Martinez's strategy in issue by presenting Kirkwood's testimony and by arguing to this court that "the impact of the conflict of interest was not in the presentation of the defense, but rather in the initial selection of the defense to present."

In accordance with the above, we overrule appellant's third, fourth, and eighth propositions of law.

II

INDEPENDENT REVIEW

Pursuant to R.C. 2929.05, we independently review appellant's death sentence to determine whether the evidence supports the jury's finding of aggravating circumstances; to reweigh the aggravating circumstances against the mitigating factors; and to determine whether the death sentence is proportionate compared to other similar cases. For the reasons that follow, we affirm appellant's sentence.

A. Aggravating Circumstances v. Mitigating Factors

Appellant's four convictions of aggravated murder must merge into two, since he killed two victims. *State v. Huertas* (1990), 51 Ohio St. 3d 22, 28, 553 N.E.2d 1058, 1066. Each count has two aggravating circumstances; multiple murder, R.C. 2929.04(A)(5), and murder during the commission of an aggravated burglary, R.C. 2929.04(A)(7). As we noted in both *Gillard I* and *Gillard II*, there is overwhelming evidence supporting appellant's guilt of these offenses. 40 Ohio St. 3d 226 at 229, 533 N.E.2d 272 at 276; 64 Ohio St. 3d 304 at 312, 595 N.E.2d 878 at 883.

Appellant presented no evidence during the penalty phase and, instead, argued residual doubt as the sole mitigating factor. After a review of the record, we find that the evidence of appellant's guilt is overwhelming and convincing. We conclude that residual doubt is not an important mitigating factor in this case.

Postlethwaite positively identified appellant as Maxwell's killer as Postlethwaite lay wounded on the floor at the crime scene. Appellant attempts to discredit Postlethwaite's identification by noting the following: the only light by which Postlethwaite was able to see came from another room; Postlethwait drank eight small glasses of beer at the party prior to the murders; and Postlethwaite's right eye was partly blinded by the shooting. However, Postlethwaite retained 20/20 vision in his left eye and saw appellant's face *before* he was shot. Moreover, Postlthewaite knew both appellant and his brother.

Appellant also refers to the possible involvement of his brother, William, and Tim Foehrenbach in the murders. The evidence does not show with complete certainty that appellant shot Ensign himself, and here, residual doubt is arguably entitled to some weight. The evidence clearly shows, however, that appellant was the principal offender in Maxwell's murder, Ensign and Maxwell were also shot by the same gun, raising a strong inference that the same perpetrator shot both. Appellant's actions after the murders also corroborate his guilt. Appellant fled to West Virginia, where he altered his appearance and used the alias "Butch Johnson." Appellant also confessed to Ronald Webb that he "pulled the trigger." Although appellant challenges Webb's credibility, we are unconvinced that the record supports his arguments.

The trial court found that the guilt-phase evidence raised three other mitigating factors; provocation, R.C. 2929.04(B)(2); lack of a substantial history of criminal convictions, R.C. 2929.04(B)(5); and appellant's consumption of alcohol before the killings, R.C. 2929.04(B)(7). The trial court assigned little weight to provocation in the Ensign murder and little wight to the other two factors but gave provocation no weight in the Maxwell murder.

We, too, assign little weight to appellant's alcohol consumption and lack of a substantial criminal history. We also find that provocation is entitled to no weight in either the Maxwell or Ensign murders. There was some testimony that Ensign started the with William. Nonetheless, Ensign inflicted no direct injury on appellant and Maxwell did not provoke appellant in any way.

We also consider that appellant is the oldest of thirteen children and the father of two children. He is a high school graduate, has been self-employed as an auto mechanic, and has worked on pit crews in auto and motorcycle races. Ironically, appellant cites his close family ties as evidence of mitigation, since loyalty to his brother is one of the alleged motives for his crimes.

Appellant raises, in his sixteenth and eighteenth propositions of law, the question of whether alleged legal errors in the trial or sentencing proceedings are R.C. 2929.04(B)(7) mitigating factors. We conclude that they are not.

Generally, prejudicial errors at trial will require reversal of the conviction or sentence, rendering independent review of the appropriateness and proportionality of the death sentence moot. Similarly, errors that are waived, but amount

to plain error or ineffective assistance of counsel, will require reversal of the conviction or sentence and any independent review would be moot. Under appellant's argument, the only trial errors that would be considered in a reviewing court's independent review are harmless errors or errors waived by effective counsel that are not plain errors. We see no reason why these types of errors, committed during a fundamentally fair trial of a defendant represented by competent counsel, should be considered mitigating factors. Thus, we hold that trial errors that are either harmless or waived by effective counsel are not mitigating factors under R.C. 2929.04(B)(7).

In weighing the mitigating factors against the aggravating circumstances, we are mindful that "when a capital defendant is convicted of more than one count of aggravated murder, * * * only the aggravating circumstances related to a given count may be considered in assessing the penalty for that count." *State v. Cooey* (1989), 46 Ohio St. 3d 20, 544 N.E.2d 895, paragraph three of the syllabus. We find that the aggravating circumstances in the Maxwell murder outweigh the mitigating factors and that the aggravating circumstances in the Ensign murder outweigh the mitigating factors beyond a reasonable doubt.

B. Proportionality

We conclude that the death penalty is appropriate and proportionate for both aggravated murder convictions. The sentence is appropriate when compared with similar "course of conduct" cases involving the purposeful killing, or attempt to kill, two people. *See, State v. Brooks* (1986), 25 Ohio St. 3d 144, 25 Ohio B. Rep. 190, 495 N.E.2d 407; *State v. Frazier* (1991), 61 Ohio St. 3d 247, 574 N.E.2d 483; *State v. Combs* (1991), 62 Ohio St. 3d 278, 581, N.E.2d 1071; *State v. Davis* (1991); 62 Ohio St.3d 326, 581 N.E.2d 1362. The

sentence is also proportionate when compared with other aggravated burglary-murder cases. *See, State v. Wiles* (1991), 59 Ohio St. 3d 71, 571 N.E.2d 97; *State v. Waddy* (1992), 63 Ohio St. 3d 424, 588 N.E. 2d 819. We reject appellant's arguments that his sentence is disproportionate to the sentences received by William Gillard and Tim Foehrenbach. The cases are not similar because neither of these defendants was tried for aggravated murder. Appellant's seventeenth proposition of law is overruled.

C. Constitutionality

In his final proposition of law, appellant challenges the constitutionality of Ohio's death-penalty statutory framework. We have consistently held that Ohio's death penalty scheme is constitutional and we continue to adhere to that position. *See State v. Awkal* (1996), 76 Ohio St. 3d 324, 337-338, 667 N.E.2d 960, 972; *State v. Garner* (1995), 74 Ohio St. 3d 49, 65, 656 N.E.2d 623, 638.

For the foregoing reasons, we affirm the trial court's finding of no actual conflict, and affirm the convictions and the death penalty sentence.

Judgment affirmed.

DOUGLAS, F.E. SWEENEY and PFEIFER, JJ., concur.

RESNICK, J., concurs in judgment only.

MOYER, C.J. and LUNDBERG STRATTON, J., dissent.

APPENDIX

Proposition of Law No. I [:] A decision by a court of common pleas after the remand by an appellate court is reviewable by the court of appeals

Proposition of Law No. II [:] The failure of a trial court to hold a hearing into the conflict of interest mandates reversal of the convictions and sentences.

Proposition of Law No. III [:] Joint representation of a defendant and a potential defendant constituted an actual conflict of interest mandating reversal of the conviction and sentence.

Proposition of Law No. IV [:] When a defense attorney labors under an actual conflict of interest the error is a fundamental and structural error which is not susceptible [of] harmless error review.

Proposition of Law No. V [:] When a hearing court fails to review the entire record on the trial, the factual conclusions of the trial court are unreliable and not binding on the reviewing court.

Proposition of Law No. VI [:] A capital defendant's convictions and sentences are unreliable and inappropriate when he is denied the effective assistance of counsel, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 10 and 16 of the Ohio Constitution.

Proposition of Law No. VII [:] Appellant Gillard was denied the effective assistance of appellate counsel in violation of the Sixth, Eighth, and Fourteenth Amendments to the United

States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution.

Proposition of Law No. VIII [:] When counsel fails to investigate and present mitigating evidence and labors under a conflict of interest, the defendant is denied effective assistance of counsel in violation of his constitutional rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 10, and 16 of the Ohio Constitution.

Proposition of Law No. IX [:] The prosecutor's misconduct in the trial phase of John Gillard's capital case denied Mr. Gillard his due process right to a fair trial.

Proposition of Law No. X [:] When the appearance of judicial bias and impropriety is present a defendant is denied a fair trial, in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 5, 9, and 16 of the Ohio Constitution and Canon 3 of the Code of Judicial Conduct.

Proposition of Law No. XI [:] The trial court procedures at all stages of appellant Gillard's trial violated his rights of due process and to a reliable determination of the appropriateness of the death sentence in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 9, 10 and 16, Article I, of the Ohio Constitution.

Proposition of Law No. XII [:] When a trial court releases grand jury transcripts to the state to aid in preparation of an appeal. The court must release the transcripts to the defense and make the transcripts a part of the record on appeal.

Proposit[illegible]of Law No. XIII [:] The evidence in appellant Gillard's [illegible]e was not sufficient to support his convictions under the Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article I of the Ohio Constitution.

Proposition of Law No. XIV [:] Appellant Gillard's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Sections 9, 10, and 16[,] Article I of the Ohio Constitution were violated when the trial court reimposed the death penalty at the resentencing hearing.

Proposition of Law No. XV [:] The death sentence is inappropriate and unreliable when *voir dire* errors deny a capital defendant his right to a fair trial and a fair jury in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United states Constitution and Article I, Sections 2, 5, 9, 10, and 16 of the Ohio Constitution.

Proposition of Law No. XVI [:] The death sentence imposed on appellant Gillard is unreliable, inappropriate and violates the Eighth and Fourteenth Amendments to the United States Constitution, Sections 9 and 16, Article I of the Ohio Constitution and O.R.C. Sec. 2929.05.

Proposition of Law No. XVII [:] Appellant Gillard's death sentence was disproportionate and violated the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article I of the Ohio Constitution.

Proposition of Law No. XVIII [:] A capital defendant's death sentence is unreliable and inappropriate when he is denied the procedural safeguard of a meaningful, independent review by the trial court under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, Sections 9 and

16, Article I of the Ohio Constitution, O.R.C. Sec. (F) and O.R.C. Sec. 2929.05.

Proposition of Law No. XIX [:] A capital defendant's death sentence is unreliable and inappropriate when he is denied the procedural safeguard of a meaningful, independent review by the appellate court under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, Sections 9 and 16, Article I of the Ohio Constitution, O.R.C. Sec. 2929.03(F) and O.R.C. Sec. 2929.05.

Proposition of Law No. XX [:] The Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10, and 16, Article I of the Ohio Constitution establish requirements for a valid death penalty scheme. Ohio Revised Code Sections 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04 and 2929.05, Ohio's statutory provisions governing the imposition of the death penalty, do not meet the prescribed constitutional requirements and are unconstitutional, both on their face and as applied to appellant Gillard."

LUNDBERG STRATTON, J., dissenting. I believe an actual conflict of interest existed that adversely affected the performance of John Gillard's lawyer. Consequently, Gillard was denied his constitutional right to effective assistance of counsel and his conviction should be reversed. Therefore, I respectfully dissent.

The trial court's initial failure to conduct a hearing on the issue of conflict of interest does not mandate reversal. John Gillard's attorney, Louis Martinez, never directly raised the issue of conflict of interest on behalf of John before the trial court. Instead, the state raised the issue when William was called to testify on his brother's behalf and the state requested

the court to advise *William* of his Fifth Amendment right to remain silent. This was not the equivalent of an objection on behalf of *John*. Although the trial court appointed other counsel for the limited purpose of advising William of his rights, Martinez represented William at least until he testified at John's trial *State v. Gillard* (1992), 64 Ohio St. 3d 304, 307, 595 N.E.2d 878, 879-880.

A court is not required to *sua sponte* raise the issue of conflict of interest.

A better practice would have been for the trial court to stop the proceedings and to inquire into the potential of a conflict of interest. The fact that Martinez was later unable to testify for medical reasons at the remand hearing further underscores the importance of the timeliness of an inquiry. However, if a conflict is not raised, or inquired into, in such a hearing, a judgment will be reversed only if an appellant shows that an actual conflict adversely affected counsel's representation of the appellant. *State v. Manross* (1988), 40 Ohio St. 3d 180, 532 N.E.2d 735; *Hamilton v. Ford* (C.A.11, 1992), 969 F.2d 1006, 1011.

I believe that the evidence clearly shows that an actual conflict of interest existed because Martinez represented both John Gillard and his brother, William, who was implicated in these crimes. Although John and William were not defendants in the same case, William had been originally charged with these murders and the attempted murder. William, represented by Martinez, later pleaded no contest to discharging a firearm within city limits. An ongoing investigation into these crimes continued during John's trial and William remained the subject of the investigation. Some two and one-half years later, William agreed in a plea agreement to testify against his brother in a retrial in

exchange for a recommendation of early release following a guilty plea and sentencing for the aggravated burglary of the Hendricks home.

Because Martinez represented both brothers, the choices he made before and during John's trial lead to the inescapable conclusion that Martinez was hampered by divided loyalties that adversely affected his performance. The evidence clearly shows that Martinez's joint representation of John and William influenced his selection of witnesses, his overall defense strategy, and his ability to zealously represent the interests of John. The United States Supreme Court has held that once a conflict of interest that has adversely affected the lawyer's performance is identified, prejudice to the defendant is presumed. *Cuyler v. Sullivan* (1980), 446 U.S. 335, 100 S. Ct. 1708, 1719, 64 L. Ed. 2d 333, 347.

There is abundant testimony in the record that clearly incriminated William Gillard. Professor Kirkwood testified at the remand hearing that the following pieces of circumstantial evidence connected William to these crimes:

- William was at the house the night the murders occurred and had been in a fight with one of the victims.

- William was carrying brass knuckles.

- William was forcibly removed from the house.

- William later returned to the house and fired a gun outside shortly before the murders occurred.

- William fled the scene and was arrested four hours after the shootings.

- William gave the police a false name when he was arrested.

- Blood consistent with that of victim Denise Maxwell was found on William's shirt, and blood from victim Leroy Ensign was found on William's jacket.

- A bullet that matched the type of bullets from the murder weapon was found on William.

Martinez's trial strategy was to establish an alibi defense for John. However, based upon the compelling evidence presented at trial, there existed a plausible defense that implicated William as a substitute or alternate defendant. Instead of bolstering John's alibi with an alternate defendant defense, Martinez decided to rely solely on the alibi defense. Martinez did not and could not consider this alternative defendant theory or even a combination of the alibi/alternative defendant theory because he represented William as well as John. Where the attorney's choice of strategy would have been different had there been separate representation, the attorney renders ineffective assistance of counsel. *Griffin v. McVicar* (C.A.7, 1996), 84 F.3d 880, 887.

Further evidence of an actual conflict of interest is demonstrated by Martinez's direct examination of William, who testified on behalf of his brother. A conflict of interest may arise when counsel representing two defendants must decide whether either or both of the defendants should testify. "This kind of decision, difficult enough where two defendants at same trial are represented by different counsel, is made doubly difficult where they are represented by the same counsel." *Morgan v. United States* (C.A.2, 1968), 396 F.2d 110, 114. This decision "may be unduly affected by the risk

that [one defendant's] testimony may develop so as to disclose matters which are harmful to the other defendant or which conflict with the other defendant's story. The attorney's freedom to cross-examine one defendant on behalf of another will be restricted where the attorney represents both defendants." *Id.*

Here, although William was not a defendant in this case, his actions were so intertwined in the facts of the case that Martinez was tactically unable to fully examine William to extract testimony helpful to John because it would also tend to incriminate William. The majority finds that this choice of strategy was not prejudicial because the dangers of pursuing the alternative defendant theory *could* have had an adverse impact on John. However, the court in *United States v. Carrigan* (C.A.2, 1976), 543 F.2d 1053, 1057, stated:

> "We cannot accept the proposition that the more potent the Government's case, the less compelling the criminal defendant's constitutional right to independent counsel. * * * Trial counsel could not possibly have given his full measure of professional devotion to clients presenting inconsistent defenses. Each was entitled to zealous and independent counsel. While here counsel obviously slighted White [one client] and favored Carrigan [his other client], he could not fully exploit Carrigan's willingness to testify without further damaging White's credibility. We see no need to speculate as to how independent counsel could have more competently handled the defense of either defendant. The record discloses the sharp conflict in their positions which, in the nature of things, prejudiced each even if one was apparently less disadvantaged than the other."

Here, Martinez clearly did not vigorously pursue an allegation that William was the participant in the murders and that John had a alibi, because this would prejudice his own client, William

The majority reasons that if William had taken the fall, so would John by association. This "united we stand, divided we fall" approach was rejected in *Foxworth v. Wainwright* (C.A. 5, 1975), 516 F.2d 1072, because, the court concluded, the conflict occurs not in presenting the defense chosen by counsel but in selecting defenses and strategies in the first place. The *Foxworth* court stated:

> "Under these circumstances, counsel's choice of the 'united we stand, divided we fall' defense *was not a free choice of strategy. It was the only course open to an attorney* with the unenviable task of saving three boys from the electric chair. 'It must be remembered that in the cases involving conflicts of interest, the conflict *does not appear full-blown upon the record, since counsel may throughout endeavor to reconcile the conflict.*'" (Emphasis added.) *Id.*, 516 F.2d at 1079-1080. The *Foxworth* court reasoned that had counsel represented one defendant only, counsel could have more fully cross-examined prosecution witnesses on their testimony to inculpate the co-defendant, but that was not an avenue open because of counsel's joint representation. *Id.* at 1080.

As was the case in *Foxworth*, I believe Martinez was so hindered by the joint representation that he also failed to effectively cross-examine other witness. Ron Postlethwaite, one of the victims, testified that he had heard gunshots in the backyard and saw William shoot a gun into the air. Postlethwaite then went back to sleep. Postlethwaite also

testified that there was a third party present that evening, Timothy Foehrenbach. Martinez did not pursue inconsistencies in Postlethwaite's testimony regarding mistaken identity, his demeanor when police and emergency personnel arrived, and his failure to identify John to the paramedics who treated him at the scene. Paramedics noted that Postlethwaite was oriented, yet a police officer on the scene described him as "raving." A thorough cross-examination of Postlethwaite and other prosecution witnesses to emphasize William's presence at the scene would have strengthened John's alibi defense and could have established sufficient reasonable doubt in the jury's mind as to the guilt of John. However, because of the joint representation Martinez did not, and could not, pursue questioning that would have implicated William which, at the same time, would have exonerated John.

The case of *Griffin v. McVicar*, (C.A.7, 1996), 84 F.3d 880, is particularly on point. In *Griffin*, defense counsel represented two defendants, Griffin and Smith, who were both charged with the murder of three individuals and an attempt to murder a fourth. Counsel presented a joint alibi defense. His main strategy was to discredit the eyewitness identifications of both defendants.

While eyewitness testimony consistently implicated Griffin's co-defendant, there were significant contradictions in the testimony implicating Griffin. *Id.* at 889. Griffin asserted that he was denied effective assistance of counsel. Griffin claimed that his attorney failed to present the alternative defense that Griffin was merely a nonparticipating bystander, that his attorney was unable to emphasize testimony that would exonerate Griffin at the expense of Smith, and that his attorney failed to pursue lines of inquiry to aid Griffin at the expense of his co-defendant. Griffin

claimed that, instead, his attorney's defense strategy was highly prejudicial to Griffin.

As to ineffective assistance of Griffin's counsel, the Seventh Circuit cited conclusions reached by the state court of appeals in the same case:

> "'As it was, [the attorney] only pointed to the inconsistencies and ambiguities as matters going to the credibility of the State's witnesses. Counsel could not give Griffin the best possible defense under the circumstances because to do so would have been disloyal to Smith, his original client. Because of this conflict of loyalties, he remained silent when independent counsel would have spoken out of Griffin's behalf.'" *Id.* at 885, quoting *People v. Griffin* (1984), 124 Ill. App. 3d 169, 181, 463 N.E.2d 1063, 1072, 79 Ill. Dec. 509.

The Seventh Circuit affirmed the grant of Griffin's petition for writ of habeas corpus: The court found that a conflict of interest existed on the basis that Griffin's counsel had failed to discuss with him the likely untruth of his alibi and the near certainty it would not be believed by a jury. This, coupled with the failure to assert an alternate defense that could rest on the weaknesses and contradictions in the testimony that implicated him in this shooting, left Griffin with the task of refuting the evidence against both defendants as well as to establish an alibi on behalf of both of them. The *Griffin* court reasoned:

> "In the face of the uncontradicted evidence placing Smith at the scene during the shootings, Griffin's testifying to an alibi which involved Smith could do nothing but damage his own case. While a defense

based on simply raising doubts about the credibility of the testimony implicating Griffin in the shootings might well have been unsuccessful, the joint alibi defense was nearly as weak as no defense at all. There was only the slimmest chance, if any, that a jury would believe the alibi in the face of the consistent eyewitness testimony placing Griffin and Smith at the scene of the murders. On the other hand, an attorney representing only Griffin could have impeached the identifications of Griffin as a shooter by exploiting obvious inconsistencies in testimony. The joint representation prevented [Griffin's counsel] from exploiting the disparity in strength of the respective prosecution cases agin Griffin and Smith.

"* * * It is often the unenviable job of defense counsel to choose among unpromising defenses. However, when an actual conflict of interest due to joint representation constrains an attorney to choose the hopeless in favor of the unpromising, the defendant has received ineffective assistance of counsel." 84 F.3d at 890.

Finally, the Seventh Circuit found that the record disclosed no waiver of conflict on Griffin's part or any evidence that the attorney discussed the potential of conflict of interest or the alternative defendant theories with his client. Nor was there any evidence presented at the remand hearing that Martinez had discussed the conflict of interest that existed because of his representation of both John and William so that John could make an informed choice about waiver and the selection of other defense theories.

Although William was not a co-defendant in the same trial as John, he was charged with the same crimes. The reasons

for the existence of the conflict of interest are identical to those in the cases cited. The record in this case is replete with evidence implicating William in these crimes, from blood on his jacket, a matching bullet found on his body, and his flight from the scene, to his fight with one of the victims on the night of the murders. Initially, an arrest warrant was issued only for William. William's plea of no contest to the unlawful discharge of a firearm *placed him by his own admission* at the scene of these crimes. William's later plea included an agreement to testify against his brother if retrial occurred. Clearly, there was sufficient evidence upon which Martinez should have established an alternate defendant theory. Martinez could have used this evidence to attack the strength of the identification of John at the scene of the crime. However, Martinez did not present this evidence as part of a *defense strategy*, nor did he argue it to the jury in support of reasonable doubt for John's involvement. Because of Martinez's joint representation, he was constrained to rely solely on the alibi defense and was not free to pursue this plausible alternate defendant theory as part of his defense strategy.

Although this case has a long and tortuous history, one still cannot overlook the actual conflict that clearly affected Martinez's ability to zealously represent John. Martinez was left with no choice but to choose the weaker line of defense. For these reasons, I believe reversal is mandated and, therefore, I respectfully dissent.

MOYER, C.J., concurs in the foregoing dissenting opinion.

APPENDIX H

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

CASE No. 1985-CR-5023

[Filed June 30, 1995]

STATE OF OHIO	)
Plaintiff	)
	)
v.	)
	)
JOHN GRANT GILLARD	)
Defendant	)
	)

JUDGE SINCLAIR

JUDGMENT ENTRY

OPINION OF THE COURT REGARDING REMAND FROM THE OHIO SUPREME COURT

This matter comes before the Court on a remand from the Ohio Supreme Court. The remand requested the following of the trial court: "We remand the cause to the trial court with instructions to conduct a hearing to determine whether an actual conflict of interest existed in Attorney Martinez' representation of appellant." In determining this matter the

Court has had the benefit of various parts of the trial transcript from the original trial before Judge Unger, the briefs and the arguments of counsel on the remand; and the testimony and exhibits produced at the evidentiary hearing held as part of the remand.

The gravamen of the conflict issue arises from the dual representation of two brothers, William Gillard and the Defendant, John Gillard. Both were originally charged in connection with the murders, of Denise Maxwell and Leroy Ensign and the attempted murder of Ronnie Postlewaithe. At the Municipal Court level, both men were represented by Attorney Martinez at a preliminary hearing. The Defendant, John Gillard, was bound over to the Grand Jury. William Gillard's charges were dismissed after he plead guilty to a misdemeanor of discharging a firearm. His initial case was disposed of as a misdemeanor at the Municipal Court level.

During the trial of John Gillard, as part of the defense case, William Gillard was called as a defense witness. Mr. Martinez was representing John Gillard throughout the court of the felony prosecution of Mr. Gillard. Prior to William Gillard taking the witness stand, the prosecutor raised the issue of a potential conflict of interest. This conflict of interest involved William Gillard being represented by Mr. Martinez and being called as a witness for the defense. It was the prosecutor's concern that William Gillard should be advised of his constitutional right not to testify so that he would not be prejudiced should there be further charges filed against him. The prosecutor's exact statement of the Court indicated that, "there could be a conflict at this point". See Volume 2, Week 5, of the Trial Transcript. After a hearing and after discussions with counsel, the Court appointed separate counsel to William Gillard. The appointed lawyer sat through the testimony of Mr. Gillard and Mr. Gillard

voluntarily took the witness stand and testified on John Gillard's behalf.

William Gillard's testimony on direct, was not harmful to John Gillard. He was called to help corroborate the alibi defense of John Gillard, and his testimony, in fact, helped corroborate this defense. Mr. Martinez fully and completely elicited William Gillard's testimony on behalf of John Gillard. Mr. William Gillard was represented by separate counsel throughout the testimony and his testimony did not in anyway incriminate John Gillard. It if this Court's finding that Mr. Martinez was zealous in his representation of John Gillard throughout the testimony of William Gillard. His testimony certainly helped to corroborate the alibi defense of John Gillard.

The Defendant, John Gillard, also testified on his own behalf. His testimony again corroborated the testimony of his brother, William, concerning the alibi defense. John Gillard never at any time in any way implicated his brother in the murders. Their testimony was complimentary of each other and not conflicting of each other. See Volume 5, Week 5, of the Trial Testimony at Pages 788 and 794, for examples of this testimony. The two Gillards had a common story and both maintained they were not involved in the incident and that the prosecution witnesses were not credible and were lying.

The transcript areas reviewed in this case fully reveal a vigorous and zealous defense of Mr. John Gillard by his defense counsel, Louis Martinez. The defense was well planned, well executed and competent. The defense was free of any hint of any divided loyalties on behalf of Mr. Martinez. The Court can find no actual conflict of interest in any of the trial proceedings.

At the evidentiary hearing held as part of the remand if in this matter, three witnesses were called to testify. Mr. Martinez did not testify at the remand hearing. It should be noted that Mr. Martinez is a stroke victim and he is no longer able to communicate. Mr. Martinez, therefore, did not testify.

The first witness called by the Defendant was Craig Chessler. Mr. Chessler was co-counsel with Mr. Martinez in the defense of John Gillard at the trial level. Mr. Chessler indicated that his representation began after the indictment had been issues by the Stark County Grand Jury. Mr. Chessler assisted in preparation and trial of the case. He was present during meetings with John Gillard prior to trial and daily throughout the course of the trial. He indicated that he was not aware of any formal representation of William Gillard by Mr. Martinez during the trial of John Gillard. Mr. Chessler indicated that he had been involved in some of the strategy discussions regarding the defense of the case. He did indicate that Mr. Martinez made final decisions after consultation with Mr. Gillard concerning the defense strategy. He indicated that eh defense strategy was a straight alibi defense. In short, the defense strategy was to indicate that Mr. Gillard was elsewhere at the time of the murders. The strategy was to indicate that the prosecution witnesses were lying and could not be believed. As part of the defense preparation in this matter, Mr. Chessler spoke with "countless witnesses" including William Gillard to help prepare the defense.

Mr. Chessler indicated that he first time he was aware of any potential conflict of interest occurred during the trial when Mr. Martinez indicated to the Court that he would be calling William Gillard as a trial witness. When Mr. Gillard was called as a witness, the issue was raised by the prosecutor

for the first time. Mr. Chessler indicated that he had no knowledge of William Gillard be represented or counseled by Mr. Martinez during Mr. Chessler's involvement in the defense of John Gillard. Mr. Chessler did not indicate that any problems was perceived by himself, Louis Martinez, or John Gillard regarding there being any conflict in Mr. Martinez representing John Gillard.

Mr. Chessler indicated that the defense in this matter was a straight alibi defense. Simply put, Mr. John Gillard was in the company of others at a party on Harrisburg Road at the time of the murders. Mr. Chessler indicated during the investigation phase of the case that the defense had speculated on a possible shooter, but it was pure speculation. Mr. Chessler indicated that no real names were ever pursued that would provide a potential other defendant defense.

Mr. Chessler, in his testimony, did not indicate that William Gillard was a potential defense suspect. Mr. Chessler, on the other hand, indicated that no other names had been pursued or discovered as potential suspects. Mr. Chessler also did not indicate any divided loyalties as it relates to the defense provided by Mr. Martinez. Mr. Chessler provides no evidence of an actual conflict of interest involving Mr. Martinez ongoing representation.

Mr. Chessler was co-counsel with Mr. Martinez, he was part of the defense team in this matter. He was the best information available concerning the inner workings of the defense, the possibility of the best viable defense and the loyalties of Mr. Martinez. Mr. Chessler did not indicate that MR. Martinez had any actual conflict of interest in his representation of Mr. Gillard.

The defense also called Mr Don Wuertz. Mr. Wuertz is a former Canton Police officer, who after leaving the police department, performed private investigation work for Mr. Martinez. Mr. Wuertz indicated that he never spoke with John Gillard during the trial preparation of this matter. He indicated that he and Mr. Martinez had discussed a possible conflict of interest. Mr. Wuertz indicated that Mr. Martinez and Mr. Wuertz had discussed a potential conflict of interest involving the representation of both William and John Gillard at the Municipal Court level. Mr. Wuertz indicated that he was really not an expert on legal issues and was not educated on the issues like Mr. Martinez. Mr. Wuertz indicated that Mr. Martinez said that no conflict of interest existed. Mr. Wuertz never independently raised the issue indicating that he had relied on Mr. Martinez' opinion. It is interesting to note also that Mr. Wuertz testified at the trial of Mr. Gillard and never raised the issue of any potential conflict of interest. He also did not indicat3e at the remand hearing that he in any way had covered up evidence or otherwise not pursued evidence at MR. Martinez direction. The trial testimony of MR. Wuertz indicates Mr. Wuertz was an active participant in developing the "straight alibi" theory and in developing evidence to discredit Mr. Postlewaithe's eyewitness version of the shooting. See 5th Week Trial Transcript, Vol. 4, starting at Page 631. See also page 666 where Mr. Martinez indicates that Mr. Martinez and Mr. Wuertz interviewed the witnesses jointly.

The testimony of Mr. Wuertz was vague and filled with conclusory statements but without specific facts to support his conclusions. The Court finds that Mr. Wuertz' testimony regarding a conflict of interest is not supported by sufficient, credible, factual underpinnings. The Court finds his testimony to be of little value. Mr. Wuertz was a trial witness for the defense and never at trial or at any other point in time

raised the issue of any conflict of interest. Further, Mr. Wuertz never indicated that Mr. Martinez instructed him that evidence should be withheld or not pursued and he provided no testimony of any divided loyalty on the part of Mr. Martinez. Mr. Wuertz did not establish that Mr. Martinez' performance was adversely affected in any way toward his representation of John Gillard.

The final witness called by the defense was Charles Kirkwood. Mr. Kirkwood is a retired law school professor from the University of Akron. Mr. Kirkwood's testimony was accepted over the objection of the State. The objection was based on a claim that any expert opinion regarding a possible conflict of interest would usurp the role of the trial judge. The testimony was admitted with the Court indicating that its relevance and weight would be judged by the trial court.

Mr. Kirkwood testified that in his opinion there was no rule prohibiting the representation of multiple defendants in a capital case. He indicated that whenever you represent multiple parties you have a potential conflict of interest. The key to a conflict of interest in his opinion was whether the loyalty to the client was jeopardized. Mr. Kirkwood was not able to provide this Court with any sufficient, factual underpinnings showing that an actual conflict of interest existed in this case. Mr. Kirkwood did not show that the loyalty of Mr. Martinez was to anyone other than John Gillard.

It was Mr. Kirkwood's opinion that an actual conflict of interest existed in this matter since an "alibi/other suspect" defense was not presented to the jury. Mr. Kirkwood indicated that the "alibi/other suspect" defense was in the abstract, the best defense in a criminal case. he did indicate

that this was a generalization and that in any particular case, the best defense was what fits the particular case's unique factual situation.

Mr. Kirkwood stated that although he believed and actual conflict of interest existed, it may not rise to the level of ineffective assistance of counsel. He indicated that this was a decision that could only be made by the trial court. This Court finds that Mr. Martinez' representation did not rise to the level of ineffective assistance of counsel nor to an actual conflict of interest.

Mr. Kirkwood stated that Mr. Martinez chose to utilize a "straight alibi" defense. Mr. Kirkwood indicated that this defense was a plausible defense and it was properly presented and competently handles.

This Court respectfully disagrees with Mr. Kirkwood's opinion concerning an "alibi/other suspect" defense. Mr. Kirkwood agreed that the "alibi/other suspect" defense was the best defense when looking at an abstract generalization. He agreed, based in the Court's questioning, that the facts of each case must be weighed independently to make this determination. This Court feels, in reviewing the facts of this case, that the best, most credible defense was a "straight alibi" defense. This is the defense put forth by Mr. Martinez on behalf of John Gillard. The best defense in this matter was to claim that the key prosecution witnesses were lying and that they were out to get John Gillard. To promote an "alibi/other suspect" defense, simply did not make good trial strategy based on the facts that were presented by the prosecution. There was direct eyewitness testimony from one of the individuals shot by John Gillard, that he was the perpetrator of the crimes. This was not a case of circumstantial evidence but instead a case of exacting

eyewitness testimony. This witness (Mr. Postlewaithe) positively identified John Gillard as the perpetrator of the crimes. The "alibi/other suspect" defense does not make viable sense under this scenario. The best defense was to claim a complete alibi and to use a "straight alibi" and to utilize as many alibi witnesses as were possible. One of the alibi witnesses was William Gillard.

Mr. Martinez attempted to discredit the eyewitness testimony, not only through cross examination but through alibi witnesses. These witnesses included the Defendant, John Gillard, himself. William Gillard was an important alibi witness. To have pointed the finger at William Gillard would have been to lose his alibi testimony. This would not have been a wise trial tactic. His favorable defense testimony was more important than a weaker theory to use him as a potential suspect. The testimony of William Gillard corroborated the testimony of Defendant, John Gillard.

Any attempt to criticize the representation of Louis Martinez of Mr. John Gillard due to the "straight alibi" defense, is simply second guessing experienced trial counsel. The choice of Mr. Martinez of pursuing a "straight alibi" defense over an "alibi/other suspect" defense does not constitute an actual conflict of interest. In fact, to this Court, the straight alibi defense seems to have been the most logical and best choice available to Mr. Martinez.

There is no evidence that Mr. Martinez had divided loyalties in his representation of John Gillard. See *State vs. Gillard*, 64 Ohio State 3rd 04 at Page 309 (1992). An actual conflict of interest cannot occur simply by Monday morning quarter backing defense counsel's strategy. The evidence presently before the Court does not establish that Mr. Martinez had divided loyalties in any manner towards his

representation of John Gillard. In fact, the items presently before the Court indicate to this Court a zealous and appropriate representation of John Gillard.

Ohio law on the issue before the Court is well summarized in *State vs. Manross*, 40 Ohio State 3rd 180 (1988). In *Manross*, the Ohio Supreme Court stated that a defendant must show that an actual conflict of interest adversely affected his lawyer's performance in order to prevail regarding a conflict of interest. The Court stated that the term "conflict of interest" bespeaks a situation in which the regard for one duty tends to lead to disregard of the other. In the matter presently before the Court no such showing has been made.

A further Ohio Appellate case discussing conflict of interest is *State vs. Sanchez*, Case No. 62796, Court of Appeals of Cuyahoga County, June 9, 1994. This case provides the following principles of law:

> "An attorney representing multiple defendants in criminal proceedings is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial."
>
> "the term 'conflict of interest' bespeaks a situation in which regard for one duty tends to lead to disregard of another."
>
> "There is no conflict where the two defenses did not result in one assigning blame to the other and where both defendants had a common interest in attacking the credibility of prosecution witnesses."

In the present case, Attorney Martinez steadfastly maintained that no conflict of interest existed. Further, there was no defense in this matter wherein one party assigns the blame to the other. The evidence before the Court indicates that a common interest existed in attacking the credibility of the prosecution witnesses. Therefore, no actual conflict of interest existed.

The Court has also reviewed relevant Federal case law. *Holloway vs. Arkansas*, 435 U.S. 475, 98 Supreme Court 1173 (1978) involved trial counsel appointed to represent three co-defendants. Counsel had requested the appointment of separate counsel because of confidential information that had been received from one of the co-defendants which created a conflict of interest. Counsel had indicated that if any of the co-defendants testified, that counsel would not be able to cross examine the testimony of the co-defendant because of the confidential information that had been received from the testifying co-defendant. Therefore, it was claimed that the effectiveness as counsel would be hampered. Factually, there are no similarities between the case presently before the Court and *Holloway*. However, the Supreme Court does provide some guidance in determining whether an actual conflict of interest exists:

> "An attorney representing two defendants in a criminal matter is n the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial. Attorneys are officers of the Court, and when they address the Judge solemnly upon a matter before he Court, their declarations are virtually made under oath." See Page 1179.

A second United States Supreme Court decision provides guidance to the Court in determining an actual conflict of interest. See *Cuyler vs. Sullivan*, 446 U.S. 335, 100 Supreme Court 1708 (1980). The *Cuyler* Court provided the following relevant principles:

> "Since a possible conflict of interest is almost every instance of multiple representation, a defendant who objects to the potential conflict must have the opportunity to show the potential conflicts impermissibly imperil his right to a fair trial. But unless the trial court fails to afford such an opportunity, a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel. Such a presumption would preclude multiple representation even in cases where a common defense gives strength against a common attach." Emphasis provided within the Supreme Court Opinion.
>
> "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."
>
> "Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance."

The United States Supreme Court Opinion in *Burger vs. Kemp*, 483 U.S. 776, 107 Supreme Court, 776 (1987), is also helpful on the conflict issue. Relevant portions of the Opinion are:

". . .we presume prejudice only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that "an actual conflict of interest adversely affected his lawyer's performance'."

"Moreover, we generally presume that the lawyer is fully conscious of the overarching duty of complete loyalty to his or her client. Trial courts appropriately and necessarily rely in large measure upon the good faith and good judgment of defense counsel." Underling supplied by the trial court.

"Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court; examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable."

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."

In reviewing the principles of law provided by both the Ohio Supreme Court and the United States Supreme Court, this Court does not find that an actual conflict of interest existed. In this case, a common defense, in fact, provided strength to both parties defenses against a common attach from the prosecution witnesses. Such a common defense does not constitute an actual conflict of interest by an means. See *Glasser vs. United States*, 315 U.S. 60 (1942). Also, see

Cuyler vs. Sullivan, 446 U.S. 335 (1980), wherein the United States Supreme Court stated, "a common defense. . .gives strength against a common attack." The defense strategy here was to use William Gillard to corroborate the testimony of John Gillard. William Gillard provided his testimony even after being provided with separate legal counsel. When John Gillard testified on his own behalf, he corroborated William' testimony. It was a common defense that neither brother was involved in the murders. The choice defense tactics employed by Mr. Martinez certainly does not constitute an actual conflict of interest. There is no testimony or evidence that any dual representation at any point in time adversely affected the performance of Mr. Martinez as John Gillard's trial counsel.

Mr. Martinez steadfastly maintained that no conflict of interest existed. See Volume 5, Page 254, Week 5 of the Trial Transcript. Mr. Wuertz, as the remand hearing, indicated that Mr. Martinez had discussed the potential conflict and had indicated that no conflict existed. Mr. Martinez, by his conduct, indicated that no conflict existed. Mr. Martinez, by his conduct, indicated that he was well aware that a potential conflict could exists by it was his opinion that no actual conflict of interest, the vast majority of the cases involve trial counsel bringing the actual conflict of interest to the court's attention. AS an officer of the court, Mr. Martinez had such a duty. There is no evidence to indicate that Mr. Martinez did not exercise his duty. In fact, Mr. Martinez steadfastly felt that no conflict existed. Mr. Martinez was in the best position to determine this issue. AS stated by the Supreme Court, defense counsel has an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial. See *Cuyler vs. Sullivan*, 446 U.S. 335 (1980). Further, an attorney representing multiple defendants

in criminal proceedings is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of trial. See *Holloway v. Arkansas*, 435 U.S. 475 (1978). In this case, Mr. Martinez steadfastly indicated that no conflict of interest existed. The opinion of trial counsel must be provided with some deference. See *Burger v. Kemp*, 483 U.S. 776 (1987).

To summarize, it is this Court's opinion based on a review of the entire matter presently before the Court, that this Court does not find an actual conflict of interest existed in the representation by Mr. Martinez. This matter is, therefore, returned to the Ohio Supreme Court pursuant to the instructions of the Court's original remand, for further proceedings pursuant to the law.

/s/_____
HON. LEE SINCLAIR

APPENDIX I

SUPREME COURT OF OHIO

No. 90-1613

[Filed August 12, 1992]

The STATE of Ohio,	)
Appellee,	)
	)
v.	)
	)
GILLARD,	)
Appellant.	)
	)

APPEAL from the Court of Appeals
for Stark County, No. CA-6701

Appellant, John Grant Gillard, was indicted for the aggravated murders of Denise Maxwell and Leroy Ensign. For each of these two murders, two counts were returned: one charging that the offense was committed with prior calculation and design (R.C. 2903.01[A]), and one charging felony murder (R.C. 2903.01[B]). Each of the four counts of aggravated murder carried two death penalty specifications. Appellant was also indicted (on two separate counts) for the attempted aggravated murder of Ronnie W. Postlethwaite. A seventh count of the indictment charged appellant with aggravated burglary.

Appellant was tried before a jury and was convicted of all charges and specifications alleged in the indictment. For the aggravated murders of Maxwell and Ensign, the trial court, following the jury's recommendation, sentenced appellant to death.

On appeal, the court of appeals reversed the judgment of the trial court and remanded the cause for a new trial concluding that appellant's convictions were not proper. Therefore, the court of appeals did not independently review appellant's death sentences for appropriateness and proportionality in accordance with R.C. 2929.05(A). The court of appeals did, however, hold against appellant on a number of appellant's assignments of error--many of which concerned the sentences of death.

Thereafter, the state of Ohio, appellee, appealed to this court. Appellant cross-appealed on two issues relative to the penalty of death. In *State v. Gillard* (1988), 40 Ohio St.3d 226, 533 N.E.2d 272, we rejected appellant's arguments on cross-appeal, reversed the judgment of the court of appeals (thereby reinstating appellant's convictions and sentences), and remanded the cause to the appellate court to conduct, pursuant to R.C. 2929.05(A), an independent review of the death sentences for appropriateness and proportionality.[1] On remand, the court of appeals affirmed appellant's convictions and the sentences of death.

The cause is before this court upon an appeal as of right.

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[1] A complete statement of the facts of this case concerning appellant's convictions and death sentences can be found in our reported opinion in *Gillard, supra*.

DISPOSITION:

Cause remanded with instructions.

SYLLABUS:

Where a trial court knows or reasonably should know of an attorney's possible conflict of interest in the representation of a person charged with a crime, the trial court has an affirmative duty to inquire whether a conflict of interest actually exists. The duty to inquire arises not only from the general principles of fundamental fairness, but from the principle that where there is a right to counsel, there is a correlative right to representation free from conflicts of interest.

JUDGES: DOUGLAS, MOYER, SWEENEY, WRIGHT, BROWN, RESNICK, HOLMES

OPINION

Given our previous determination in *Gillard, supra*, our only remaining task in this death penalty case is to review appellant's propositions of law relating to the court of appeals' review of the death sentences for appropriateness and proportionality, and to conduct our own independent review of the appropriateness and proportionality of the death sentences pursuant to R.C. 2929.05(A). However, appellant has raised an additional matter before us which is of paramount importance. Specifically, appellant claims that his trial counsel, Louis H. Martinez, may have labored under a conflict of interest in his representation of appellant at trial. Although appellant has never previously raised this issue, we have decided to address the question because of the possibility that appellant has been denied his most fundamental

constitutional rights under the Fifth and Sixth Amendments to the United States Constitution. Where, as here, a possible violation of due process and of the right to counsel exists, we are not only empowered to consider the question, but it is our duty to do so as a court of last resort. The facts giving rise to the controversy are as follows:

I

The crimes in this case were committed in January 1985 at 213 Kennet Court, Canton, Ohio. Appellant and his brother, William M. Gillard, were arrested in connection with the shootings. Both men were represented by Attorney Louis Martinez at a preliminary hearing[2] in Canton Municipal Court on January 11, 1985. Following the hearing, appellant was bound over to the Stark County Grand Jury which returned the indictment against him. The municipal court dismissed the complaint against William Gillard for aggravated murder and attempted aggravated murder. However, the court found cause to believe that William did commit a misdemeanor offense by discharging a firearm outside the residence at 213 Kennet Court just before the killings and the attempted aggravated murder. On Martinez' advice, William pled no contest to the misdemeanor offense.

The case against appellant proceeded to trial where appellant was again represented by Martinez. Meanwhile, the Stark County Grand Jury continued its investigation into William Gillard's involvement in the crimes. During appellant's trial, the state presented evidence implicating William Gillard as a participant in the commission of the

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[2] Appellant's pending motion to supplement the record with the transcript of the preliminary hearing is granted.

crimes. Martinez attempted to preclude and/or discredit evidence of William's involvement in the matter.

During the fifth week of appellant's trial, Martinez called William Gillard to testify as a witness for the defense. At this time the assistant prosecuting attorney, Alicia M. Wyler, informed the trial court (in a discussion in chambers) of a possible conflict of interest facing attorney Martinez:

> "Miss Wyler: * * * William Gillard is currently under investigation in the proceedings continuing into the investigation of these crimes * * *. The Grand Jury has heard evidence on this man * * * since February 5th [1985] * * * and there very well may be a criminal indictment on this man. This has been an on-going investigation for gathering additional evidence.
>
> "This man [William Gillard] clearly, in addition to being advised of his Fifth Amendment Right to remain silent, it is my understanding that Mr. Martinez has represented this man up to this point and I think it becomes clear that there could be a conflict at this point. I think that the Court should advise this man of his right to appoint an attorney other than Mr. Martinez who can clearly advise him of the situation and his rights.
>
> "* * *
>
> "I think that we clearly have a conflict of interest here. * * * I feel that we all have a duty to assign him [William] an attorney and have him fully advised on this particular matter.

"Mr. Martinez: I will say to this Court that I have represented Bill Gillard in this matter from the very first day. I do not feel that there is a question of a conflict. I think I am capable of advising him of his rights.

"However, you can appoint him a lawyer if you feel that there is a conflict. * * *

"* * *

"Miss Wyler: I just think that given the seriousness of this matter that we should get another attorney to talk to him [William] about this matter. Obviously, Mr. Martinez can not see the conflict. However, I see there is a conflict here if we do not advise * * * [William] further.

"Mr. Martinez: I don't know what the purpose is in this trial of placing all this evidence against William Gillard. * * * But I think that I am a competent attorney. I don't know, but I was competent enough to represent this man at the preliminary hearing. I have represented them both.

"* * *

"The Court: Well what we're going to do here is to send this Jury home at the present time. I think that the Court will have William Gillard come in and come before the Court and I will inquire of him as to his indigency and I will inform him of the possible conflict and attempt to solve this question this morning and attempt to appoint someone immediately to speak with him * * *."

> Thereafter, the trial court advised William Gillard of his Fifth Amendment right not to testify as a witness in the proceedings against appellant, given the ongoing investigation by the Grand Jury into William's involvement in the crimes. In further addressing William, the trial judge stated:
>
> "* * * *[T]he Court finds that there could be a potential conflict of interests with regard to Attorney Martinez representing both you and your brother, John Gillard.* Not that Mr. Martinez would not strive very hard to see to it that, uh, or conduct himself in a way which in which he would do so with integrity with regard to this representation of both you and John Gillard, *but there may be conflicts in regard to his representing both of you, which would prejudice you, yourself, John Gillard and the State of Ohio, uh, any one or all of those parties, should Mr. Martinez continue as your legal counsel.*" (Emphasis added.)

Accordingly, the trial court appointed independent counsel to represent William Gillard. However, the trial court did *not* address *appellant* with respect to any possible conflict of interest and did *not* inquire into whether Martinez' representation of William affected, or would affect, Martinez' representation of *appellant*.

Upon conferring with counsel, William Gillard waived his Fifth Amendment rights and chose to testify as a witness for the defense. On direct examination, Martinez elicited testimony from William that the charges against him had been dismissed at the preliminary hearing while the charges against appellant were not. Further, William denied ever having a gun in his possession on January 1, 1985, and denied any involvement in the shootings. For the most part, William's

testimony on direct examination provided an explanation for all evidence implicating him as a participant in the crimes. On cross-examination, over Martinez' objection, the prosecutor impeached William's testimony with William's no contest plea to the misdemeanor offense of discharging a firearm which, for all practical purposes, placed William at the scene of the crime just prior to the murders.

II

In his first proposition of law, appellant claims that the trial court knew or should have known of a possible conflict of interest posed by Martinez' dual representation of William and appellant, and that, therefore, the trial court had a duty to inquire into the possible conflict to determine whether Martinez' loyalties to appellant were, in fact, divided. According to appellant, the trial court's failure to so inquire *mandates* reversal of appellant's convictions and sentences. In support of this argument, appellant relies on *Holloway v. Arkansas* (1978), 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426; *Cuyler v. Sullivan* (1980), 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333; and *Wood v. Georgia* (1981), 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220.

In *Holloway, supra*, one public defender was appointed to represent three defendants at a single trial. Defense counsel repeatedly requested the trial court to appoint separate counsel for each defendant, claiming that his clients' interests conflicted. The trial court denied these requests and all three defendants were convicted as charged. The Arkansas Supreme Court affirmed the convictions, holding that the record on appeal failed to demonstrate the existence of an actual conflict of interest or prejudice.

In *Holloway, supra*, the United States Supreme Court concluded that defense counsel's repeated objections to the joint representation, accompanied by his assertions of a risk of conflict of interest, required the state trial court to either appoint separate counsel or ascertain whether the risk of conflict was too remote to warrant the appointment of separate counsel. *Id.* at 484, 98 S.Ct. at 1178, 55 L.Ed.2d at 434. The court held that the state trial court's failure to inquire into the risk of conflict unconstitutionally endangered the defendants' Sixth Amendment right to counsel and required reversal of the defendants' convictions whether or not an actual conflict of interest existed, and whether or not prejudice could be shown. *Id.* at 487-491, 98 S.Ct. at 1180-1182, 55 L.Ed.2d at 436-438.

Cuyler v. Sullivan, supra, is another case involving multiple representation. *Sullivan, supra*, stands for the proposition that the duty imposed in *Holloway, supra*, for a state trial court to inquire into the possibility of conflicts of interest posed by multiple representation only arises in cases where the trial judge knows *or reasonably should know* that a possible conflict of interest exists. *Id.*, 446 U.S. at 346-347, 100 S.Ct. at 1717, 64 L.Ed.2d at 345-346. See, also, *Wood, supra*. Thus, the duty to inquire into the possible conflicts of interest posed by joint representation of codefendants may arise even though no party to the proceeding specifically objects to the multiple representation. In *Sullivan, supra*, at 347-348, 100 S.Ct. at 1718, 64 L.Ed.2d at 346, the court concluded that the facts of that case did *not* require the state trial court to conduct an inquiry into the possibility that a conflict of interest existed, stating:

> "Nothing in the circumstances of this case indicates that the trial court had a duty to inquire whether there was a conflict of interest. The provision of separate

trials for Sullivan and his codefendants significantly reduced the potential for a divergence in their interests. No participant in Sullivan's trial ever objected to the multiple representation. DiBona's opening argument for Sullivan outlined a defense compatible with the view that none of the defendants was connected with the murders. * * * The opening argument also suggested that counsel was not afraid to call witnesses whose testimony might be needed at the trials of Sullivan's codefendants. * * * Finally, as the Court of Appeals noted, counsel's critical decision to rest Sullivan's defense was on its face a reasonable tactical response to the weakness of the circumstantial evidence presented by the prosecutor. [*Sullivan v. Cuyler* (C.A.3, 1979)] 593 F.2d [512], at 521, and n. 10. On these facts, we conclude that the Sixth Amendment imposed upon the trial court no affirmative duty to inquire into the propriety of multiple representation."[3]

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[3] Having concluded that the state trial court had no affirmative duty to inquire into the propriety of the multiple representation, the *Sullivan* majority proceeded to determine whether Sullivan was entitled to a writ of habeas corpus based upon the mere *possibility* that a conflict of interest existed. *Id.* at 348-350, 100 S.Ct. at 1718-1719, 64 L.Ed.2d at 346-347. In this regard, the court stated, "[i]n order to establish a violation of the Sixth Amendment, a defendant who raises no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance * * *" and "[w]e hold that the possibility of conflict is insufficient to impugn a criminal conviction." *Id.* at 348 and 350, 100 S.Ct. at 1718 and 1719, 64 L.Ed.2d at 346-347 and 348, respectively. While this language may seemingly support the proposition that appellant John Gillard must establish the existence of an actual conflict of interest in order to obtain some relief herein, it must be remembered that in *Sullivan, supra,* the court concluded that the

In *Wood, supra*, former employees of an adult movie theater and bookstore were convicted for distributing obscene materials in violation of a Georgia statute. The employees received fines and jail sentences for their activities, but were placed on probation with the condition that they make regular installment payments toward satisfaction of the fines. When the employees failed to make the required payments, the matter proceeded to a probation revocation hearing where the employees offered evidence that they were unable to pay the fines and expected that their former employer would do so. At this hearing, the state raised the issue that the employees' attorney was hired by the former employer and, therefore, a possible conflict of interest existed. The trial court did not inquire into the alleged conflict and ordered revocation of the probations if arrearages were not paid within five days. Unable to make such payments, the employees moved to modify the conditions of their probation. The trial court denied this motion and ordered the employees to serve the remaining portions of their jail sentences. The Georgia Court of Appeals affirmed and the United States Supreme Court granted certiorari to determine whether the imprisonment of the employees solely because of their inability to make the installment payments violated equal protection guarantees.

In *Wood, supra*, the United States Supreme Court, *sua sponte*, raised the issue concerning the possibility of a conflict of interest, stating that "[w]here, as here, a possible due process violation is apparent on the particular facts of a case, we are empowered to consider the due process issue." *Id.*,

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state trial judge had no duty to inquire into a possible conflict of interest. In cases where there is an affirmative duty to inquire into a possible conflict of interest, the United States Supreme Court has not required a showing of actual conflict or prejudice. See *Holloway, Sullivan* and *Wood, supra*.

450 U.S. at 264-265, 101 S.Ct. at 1100, 67 L.Ed.2d at 226. Based upon a review of the record, the court was unable to conclude whether the employees' attorney labored under an actual conflict of interest, but the court nevertheless held that "* * * the record does demonstrate that the *possibility* of a conflict of interest was sufficiently apparent at the time of the [probation] revocation hearing to impose upon the [trial] court a duty to inquire further."[4] (Emphasis *sic.*) *Id.* at 272, 101 S.Ct. at 1104, 67 L.Ed.2d at 230-231. The court also found that any doubt as to whether the trial court *should have been aware* of the conflict-of-interest problem was dispelled by the fact that the state explicitly raised the issue at the probation revocation hearing and requested that the trial court look into it. *Id.* at 272-273, 101 S.Ct. at 1104, 67 L.Ed.2d at 231. Accordingly, the *Wood* majority vacated the judgment of the Georgia appellate court and remanded the cause for a determination by the state trial court whether an actual conflict of interest existed. *Id.* at 273-274, 101 S.Ct. at 1104, 67 L.Ed.2d at 231. The court further ordered that if the state trial court determined, upon remand, that an actual conflict existed (and that there was no valid waiver of the right to

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[4] At this point in its opinion, the court footnoted the following discussion:

> "JUSTICE WHITE'S dissent states that we have gone beyond the recent decision in *Cuyler v. Sullivan*, 446 U.S. 335 [100 S.Ct. 1708, 64 L.Ed.2d 333] (1980). Yet nothing in that case rules out the raising of a conflict-of-interest problem that is apparent in the record. Moreover, *Sullivan mandates* a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.' *Id.*, at 347 [100 S.Ct. at 1717, 64 L.Ed.2d at 346]." (Emphasis *sic.*) *Wood, supra*, 450 U.S. at 272, 101 S.Ct. at 1104, 67 L.Ed.2d at 231, fn. 18.

independent counsel), the trial court must conduct a new revocation hearing free from conflicts of interest. *Id.*

A review of *Holloway, Sullivan* and *Wood, supra*, clearly demonstrates that where a trial court knows or reasonably should know of an attorney's possible conflict of interest in the representation of a person charged with a crime, the trial court has an affirmative duty to inquire whether a conflict of interest actually exists. The duty to inquire arises not only from the general principles of fundamental fairness, but from the principle that where there is a right to counsel, there is a correlative right to representation free from conflicts of interest. See, generally, *Wood, supra*. Where a trial court breaches its affirmative duty to inquire, a criminal defendant's rights to counsel and to a fair trial are impermissibly imperiled and prejudice or "adverse effect" will be presumed. See, *e.g., Holloway, Sullivan* and *Wood, supra*.

Although we cannot be sure that an actual conflict of interest existed, there is a clear possibility of conflict of interest on the facts of this case. We find that the trial court knew (or at *least* should have known) that a possible conflict of interest existed which could affect Martinez' representation of appellant. The conflict-of-interest problem was specifically raised by the state in this case. We are reluctant to accept the limited inquiry conducted by the trial court into whether the possible conflict affected William Gillard. Here, we are concerned with *appellant's* constitutional rights. Additionally, we are not satisfied that appointing independent counsel to represent William Gillard corrected the problem. The trial court was constitutionally required to conduct an inquiry into the possible conflict of interest to determine whether *appellant* had received, and would receive, the right to conflict-free counsel guaranteed him by the Sixth Amendment to the United States Constitution.

The argument has been raised herein that our review of the conflict-of-interest issue is limited to the plain error analysis of Crim.R. 52(B). This may be true but if a conflict of interest affecting appellant actually existed in this case, it would be clearly improper for us to speculate that the outcome of appellant's trial would not have been different had appellant received representation free from conflicts of interest. We are keenly aware of the overwhelming evidence of appellant's guilt, but it is our job to ensure that even this appellant receive the protections to which he is entitled.

III

For the foregoing reasons, we remand the cause to the trial court with instructions to conduct a hearing to determine whether an actual conflict of interest existed in Martinez' representation of appellant. If, upon remand, the trial court finds that an actual conflict of interest existed, the trial court is hereby ordered to conduct a new trial free from conflicts of interest. However, if the trial court determines that no actual conflict of interest existed, the trial court is ordered to return this cause to us so that we may complete our statutorily mandated review.

Cause remanded with instructions.

Moyer, C.J., Sweeney, Wright, H. Brown and Resnick, JJ., concur.

Holmes, J., dissents.

APPENDIX J

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

Case No. CA 6701

[Filed June 25, 1990]

STATE OF OHIO	)
Plaintiff-Appellee	)
	)
v.	)
	)
JOHN GRANT GILLARD	)
Defendant-Appellant	)
	)

Criminal Appeal from Common Pleas Court

JUDGES: Hon. Daniel B. Quillin, P.J.
Hon. William R. Baird, J.
Hon. Mary Cacioppo, J.

OPINION

QUILLIN P. J.

This case is before this court on remand from the Ohio Supreme Court (*State v. Gillard* (1988), 40 Ohio St. 3d 226)

to independently review the appropriateness and proportionality of the imposed death penalty.

On December 31, 1984, Timothy Hendricks invited several guests to his home at 213 Kennet Court, N.W. in Canton, Ohio, for a New Years Eve party. Sometime during the party, guests William Gillard, brother of the defendant-appellant John Gillard, and Leroy Ensign engaged in a fight. After Hendricks subsequently separated the two, William Gillard, superficially bloodied, left the party.

The party ended between 3:00 a.m. and 4:00 a.m. on January 1, 1985. Seven guests stayed the night, including Ensign, Ronnie Postlethwaite and Denise Maxwell. Hendricks retired to his first floor bedroom with his girlfriend, while Ensign slept in a chair in the first floor kitchen. Postlethwaite and Maxwell slept on a couch in the first floor living room. Three other guests slept in rooms on the second floor.

Postlethwaite was awakened by a gunshot and went to look out the back door. Postlethwaite observed William Gillard fire a second shot into the air from a handgun. Postlethwaite tried unsuccessfully to wake Ensign. Postlethwaite then went back to the couch to lie down.

The next thing Postlethwaite recalled was hearing the back door slammed open. He heard heavy steps "like horses trampling" and then a shot was fired. Someone grabbed Postlethwaite's hair and pulled his head back. The assailant placed a gun to Postlethwaite's temple, shot him, and threw him to the floor. Postlethwaite watched as the gunman shot Maxwell in the head, killing Maxwell. Postlethwaite recognized the gunman as defendant-appellant, John Gillard.

A neighbor, Larry Beck, heard two gunshots between 3:00 a.m. and 3:30 a.m. At 4:15 a.m. Beck heard at least two people going towards Hendrick's home. A few minutes later, Beck heard more gunfire and two men running away from Hendrick's home.

Canton police subsequently arrived at 213 Kennet Court at approximately 4:50 a.m. Officers discovered the body of Maxwell on the couch and the fatally injured Ensign near the front entrance. Paramedics were working on Postlethwaite when Canton police officer, Sheldon Godshall, asked Postlethwaite who had shot him. Postlethwaite said "Dirty John". Godshell asked, "Dirty John, who"? Postlethwaite replied, "Dirty John Gillard."

On January 4, 1985, John Gillard arrived at the house of Ronald Webb in Wellsburg, West Virginia. Gillard asked to see Donald Gorby who lived in the upstairs apartment of the two family home also occupied by the Webb family. Gorby was present in Webb's home at the time and introduced Gillard as "Butch Johnson". After approximately twenty minutes, Gillard asked Mrs. Webb to cut Gillard's hair. Mrs. Webb complied with the request.

Sometime later, Milton Smith arrived at the Webb apartment. Smith looked in and stated, "Jesus Christ, I didn't recognize you without the beard, Dirty John."

The others subsequently left Webb alone with Gillard, and Webb stated that he "read in the paper where his brother was in jail for shooting some people in Canton." Gillard stated, "I pulled the trigger, my brother is taking the fall."

Later that same day, Webb, Gorby and Gillard had a dispute concerning Webb's wife. Webb stated that he was

"going to the law." Gillard stated, "I got to get our of here." Webb carried through on his threat and reported Gillard's presence tot he Brooke County, West Virginia, sheriff's office. Gillard was subsequently arrested and identified himself to the arresting authorities as "Butch Johnson."

John Gillard was indicted for the aggravated murders of Maxwell and Ensign, and for the attempted aggravated murder of Postlethwaite. In each of these three cases, tow counts were returned: one charging that the offense was committed with prior calculation and design, R.C. 2903.01(A), and one charging felony murder, R.C. 2903.01(B). Each aggravated murder count had two death specifications. The first charging a course of conduct involving a purposeful killing or attempt to kill two or more people, R.C. 2929.04(A)(5). The other charging murder coupled with aggravated burglary, R.C. 2929.04(A)(7). Gillard was also charged with aggravated burglary, R.C. 2911.11.

At trial, John Gillard put forth an alibi defense that he was at a New Year's Eve party with his friend Jerri Oney from 10:30 p.m., December 31, 1984, until 4:30 a.m., January 1, 1985. Gillard then stated that he left the party with Oney and spent the rest of the night with Oney at her home. Oney and the hosts of the party, Tracy and Melissa Price corroborated Gillard's alibi. Gillard also claimed that he never told anyone his name was "Butch Johnson", and also denied having Mrs. Webb cut his hair.

John Gillard was convicted upon all counts and specifications. The jury recommended that Gillard be sentenced to death. The trial judge followed the recommendation and sentenced Gillard to death.

The Stark County Court of Appeals reversed the convictions on the claims of error and remanded the case to the trial court, without undertaking an independent review of the appropriateness and proportionality of the death penalty. The Ohio Supreme Court reversed the Court of Appeals and remanded the case to the Court of Appeals to perform the statutory independent review.

R.C. 2929.05(A) mandates that the court of appeals independently weigh all the facts and evidence in the record to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case.

Gillard was convicted of two aggravating specifications. The offenses were part of a course of conduct involving the purposeful killing or attempted killing of two or more persons, R.C. 2929.04(A)(5); and the offenses were committed in conjunction with the commission of an aggravated burglary, R.C. 2929.04(A)(7).

During the penalty phases of Gillard's trial, Gillard presented only one mitigating factor, pursuant to R.C. 2929.04(B)(7), for the consideration of the jury and trial judge. Gillard set forth that he was innocent of the offenses. Gillard expounded that even though the jury had found him guilty, the jury should not compound their mistake by recommending death. "Residual doubts" of a capital defendant's guilt are properly considered in mitigation. *State v. Gillard* (1988), 40 Ohio St. 3d 226, 234-35.

After a through review of the record, we hold that all offenses and specifications were proved beyond a reasonable doubt. Therefore, Gillard's claim of innocence holds little

weight in comparison to the aggravating circumstances of which Gillard was convicted.

Further, Gillard asserts that the ineffectiveness of his trial counsel was a mitigating factor, as Gillard's counsel failed to set forth evidence of other mitigating factors during the penalty phase of trial. Nevertheless, the Ohio Supreme Court has already determined that there was no deficiency in Gillard's counsel's performance. *Gillard*, *supra*, at 235.

Having found that the aggravating circumstances outweigh any mitigating factors, we must now determine whether Gillard's sentence of death is excessive or disproportionate to the penalties imposed in similar cases. R.C. 2929.05(A). We need only consider those cases from within the Fifth Appellate District where the death penalty was imposed. *State v. Steffen* (1987), 31 Ohio St. 3d 111, paragraph one of the syllabus.

The Fifth District Court of Appeals has previously reviewed five cases where the death penalty has been imposed. The court has found the death penalty appropriate in four of the cases involving a felony murder. *State v. Sneed* (May 22, 1989), Stark App. No. 6976, unreported (Rape and Aggravated murder); *State v. Stumpf* (May 22, 1986), Guernsey App. No. 760, 763, unreported (Robbery and Aggravated murder); *State v. Thompson* (June 17, 1985) Licking App. No. 2997, unreported (Robbery and Aggravated Murder); *State v. Maurer* (Feb. 13, 1984) Stark App. No. 6166, unreported (Kidnapping and Aggravated murder).

In *State v. Glenn* (Feb. 19, 1987), Guernsey App. No. 798, unreported, the Fifth District Court of Appeals vacated the death sentence in a case involving an aggravated murder with two death specifications. The first specification was that the killing was part of the course of conduct involving the

purposeful killing or attempt to dill two or more persons. The second specification was the purposeful killing of a peace officer engaged in his duties. The court found the death sentence inappropriate due to the diminished capacity of the accused, because the accused suffered from paranoid schizophrenia.

In the case *sub judice*, the killing was committed in conjunction with a felony, and as part of the course of conduct involving the purposeful killing or attempt to kill tow or more persons. There is no evidence of Gillard exhibiting any substantially impared or diminished capacity. After comparing the above cases, we hold that the sentence of death is neither excessive nor disproportionate.

Gillard asserts further that substantial errors occurring during the course of the trial proceedings render the sentence of death inappropriate. The Ohio Supreme Court has already ruled that any errors during trial were not prejudicial to Gillard. See *Gillard*, *supra*. We hold that the death sentence is appropriate beyond a reasonable doubt.

The conviction and sentence of the trial court is affirmed.

MANDATE

It is ordered that a special mandate issue out of this court directing the Court of Common Pleas to carry this judgment into execution.

A certified copy of this judgment entry shall constitute the mandate pursuant to Ohio App. R. 27.

APPENDIX K

SUPREME COURT OF OHIO

No. 87-352

[Filed December 30, 1988*]

The STATE of Ohio,	)
Appellant and Cross-Appellee,	)
	)
v.	)
	)
GILLARD,	)
Appellee and Cross-Appellant.	)
	)

JUDGES: MOYER, C.J. SWEENEY, LOCHER, DOUGLAS, WRIGHT and H. BROWN, JJ., concur. HOLMES, J., concurs in the judgment.

OPINION

The state asserts six propositions of law and Gillard's cross-appeal asserts two propositions of law. For the reasons that follow, we sustain the state's propositions of law,

* This cause was decided on December 30, 1988, but was released to the public on January 9, 1989, subsequent to the retirement of Justice Locher, who participated in the decision.

overrule Gillard's propositions of law, and reverse the judgment of the court of appeals.

I

The state's first proposition of law stems from a dispute over the procedures to be followed under Crim.R. 16(B)(1)(e), which provides as follows:

> " * * * Names and addresses of witnesses shall not be subject to disclosure if the prosecuting attorney certifies to the court that to do so may subject the witness to physical or substantial economic harm or coercion. Where a motion for discovery of the names and addresses of witnesses has been made by a defendant, the prosecuting attorney may move the court to perpetuate the testimony of such witnesses in a hearing before the court, in which hearing the defendant shall have the right of cross-examination. * * *"

Before defendant's trial began, the state sought to certify to the court that one of its witnesses might be subjected to physical harm or coercion if his identity were disclosed to the defense. *See* Crim.R. 16(B)(1)(e). Although the defense withdrew its motion for discovery, thereby waiving any sanctions for nondisclosure of the witness' name, the trial judge permitted the prosecutor to state, *ex parte*, her reasons for believing that the witness was in danger.

The prosecutor told the judge that John Gillard had been national president of the Outlaw motorcycle gang and had been an active member of that gang in four states. The prosecutor stated that Ronald Webb, who had turned Gillard

in, was a potential state's witness whose family had been threatened by Gillard's brothers. She added that the family of another suspect had been threatened with death if the suspect turned state's evidence. Finally, she said that a member of the Outlaws had telephoned another witness to threaten still other witnesses whom the prosecutor did not name.

The state then requested, based on these representations, that Webb's testimony be perpetuated pursuant to Crim.R. 16(B)(1)(e). This request was granted. As provided by the rule, the defense was present during Webb's deposition and cross-examined him.

Crim.R. 16(B)(1)(e) is substantially the same as proposed Fed.R.Crim.P. 16(a)(1)(vi), which was not adopted. *See* Proposed Amendments to Crim.Rules (1970), 48 F.R.D. 553, 589-590.

The rule provides two distinct alternatives: the state may be relieved of its obligation to disclose the names of endangered prosecution witnesses, or such witnesses' testimony may be perpetuated.[1] However, both forms of relief require the prosecution to show the existence of "an undue

---

[1] As the Advisory Committee made clear, relief and perpetuation are alternatives. 48 F.R.D. at 605. Logically, where relief from discovery is sought, the procedure must be *ex parte*; otherwise, the defense would learn the very information sought to be concealed, the identity of the endangered witness. It is equally clear that where, as here, perpetuation of testimony is sought, the certification must not be *ex parte*. Since the defense will in any event be entitled to cross-examine the witness when he is deposed, there is no reason for an *ex parte* hearing. We clarify this point in view of the trial court's evident confusion in combining these two distinct procedures.

risk of harm to the witness * * *." 48 F.R.D. at 605. Our concern here is with the judge before whom that showing is made.

In our view, when a judge hears information that a defendant has attempted to harm, coerce, or intimidate an opposing witness, there is an unnecessary risk that the judge will harbor a bias against that defendant. It is true, as the state reminds us, that judges who issue arrest warrants and preside at preliminary hearings are not barred from presiding over the defendant's trial, even though they have already found the existence of probable cause. *See Withrow v. Larkin* (1975), 421 U.S. 35, 56, 95 S.Ct. 1456, 1469, 43 L.Ed.2d 712. We also recognize that trial judges preside at hearings on motions to suppress evidence, exposing themselves to probative evidence of guilt that may later prove inadmissible, and that this exposure does not taint their impartiality.

However, the information revealed to the judge here was not merely evidence of guilt, as in the examples mentioned above. Rather, it consisted of representations that Gillard was a leader of a motorcycle gang, and that his brothers had engaged, on his behalf and perhaps at his behest, in an organized-crime tactic of intimidating witnesses by threatening the lives of their families.

Clearly, such information is more inflammatory and harder to disregard than the sort of information heard by the judge who issues an arrest warrant or presides over a motion hearing. Where, as here, the certification is *ex parte*, it is especially troublesome, for the defendant has no chance to deny or explain the allegations. It portrays a defendant as a dangerous person and a subverter of the criminal justice system. Moreover, some such information will be placed before the court in every case where the prosecutor makes a

certification under Crim.R. 16(B)(1)(e). It is the very purpose of the rule to place such information before the court so that witnesses may be protected. But where the judge who hears and is persuaded to act upon this type of information then presides over the trial, the appearance of fairness is impaired and fairness itself jeopardized.

We hold that, when the state seeks to obtain relief from discovery or to perpetuate testimony under Crim.R. 16(B)(1)(e), the judge who disposes of such a motion may not be the same judge who will conduct the trial.

However, we also hold that violation of the rule we announce today is not *per se* prejudicial. Thus, while it was error in this case for the judge to have presided at trial after hearing the state's certification, we find that error harmless in light of the overwhelming evidence of guilt, including an eyewitness account of the murder, Gillard's subsequent flight, his admission to Webb, and his possession of the murder weapon two weeks before the crime. (*See* discussion *infra* of the state's fourth proposition of law.)

Moreover, in a capital case, the court is presumed to have considered only the relevant, material, and competent evidence unless the record affirmatively shows otherwise. *State v. Post* (1987), 32 Ohio St.3d 380, 384, 513 N.E.2d 754, 759. From our examination of the record and the sentencing opinion, it does not appear that the trial judge considered any information that was presented solely by the prosecutor's certification. While he did note, in analyzing Gillard's history, character, and background pursuant to sentencing, that Gillard had belonged to several motorcycle gangs and had traveled from state to state in conjunction with his gang membership, that information was elicited without objection at trial.

We find beyond a reasonable doubt that the outcome of both phases of this trial would have been the same had different judges presided at the certification and at the trial. The state's first proposition of law is accordingly sustained.

II

In its second proposition of law, the state asserts that its actions at trial did not constitute prosecutorial misconduct. Three instances of such alleged misconduct were identified by the court of appeals.

A

Gillard's nickname was "Dirty John." In opening statement, the prosecution said that, by the time the case was over, the jury would "know exactly why that man is known as Dirty John." On cross-examination, the prosecution asked Gillard: "[T]he next thing that you did was to shoot an innocent sleeping woman * * * and put a bullet in her head, and that's why you're called Dirty John, isn't it?"

The court of appeals condemned these uses of the nickname as improper attempts to impugn Gillard's character. *See* Evid.R. 404(A)(1). While we agree it was improper, we observe that the defense did not object. The error is therefore waived unless it is plain error. Crim.R. 52(B). Weighing the evidence of guilt against the relative insignificance of the "Dirty John" nickname, it is not clear that, had the nickname not been improperly used, the outcome of the trial would have been different. *See State v. Long* (1978), 53 Ohio St.2d 91, 97, 7 O.O.3d 178, 181, 372 N.E.2d 804, 808.

B

Gillard was cross-examined at length about his motorcycle gang activity. He admitted that he had belonged to the Chosen Few, Night Riders, and Outlaw gangs. However, he denied having been an Outlaw "enforcer" or a chapter president; denied that the emblems or "colors" worn by members were "drenched in human excrement [or] urine before being worn"; and denied that "One Percenters" are necessarily motorcyclists who shun conventional lifestyles and attitudes.

The court below concluded it was prosecutorial misconduct to ask Gillard these questions without presenting evidence of the allegations implied therein after Gillard had denied them. This view is consistent with our opinions. "The attempt to communicate by innuendo through the questioning of witnesses when the questioner has no evidence to support the innuendo is improper." *State v. Williams* (1977), 51 Ohio St.2d 112, 119, 5 O.O.3d 98, 102, 364 N.E.2d 1364, 1368.

However, *Williams* relied in part upon the 1971 version of the American Bar Association Standards Relating to the Prosecution Function, Section 5.7(d), which then provided: "It is unprofessional conduct to ask a question which implies the existence of a factual predicate which the examiner knows he cannot support by evidence." That standard has since been revised, and now states: "It is unprofessional conduct * * * to ask a question which implies the existence of a factual predicate for which a good faith belief is lacking." 1 A.B.A. Standards for Criminal Justice, the Prosecution Function (2 Ed.1980), Section 3-5.7(d). *See, also*, 6 Wigmore, Evidence (Chadbourn Rev.1976) 371, Section 1808.

The good-faith-basis test is the prevailing test in other jurisdictions. *See, e.g., United States v. Katsougrakis* (C.A.2, 1983), 715 F.2d 769, 778-779; *United States v. Nixon* (C.A.5, 1985), 777 F.2d 958, 970. We now think it the better test as well, for " * * * effective cross-examination often requires a tentative and probing approach to the witness' direct testimony, and this cannot always be done with hard proof in hand of every assumed fact." *Hazel v. United States* (D.C.App.1974), 319 A.2d 136, 139. *See, also,* Evid.R. 608(B). We hold that a cross-examiner may ask a question if the examiner has a good-faith belief that a factual predicate for the question exists. Since the prosecutor's good-faith basis for asking these questions was never challenged, we presume she had one, *see United States v. Holt* (C.A.7, 1987), 817 F.2d 1264, 1275, and reverse the holding of the court of appeals.

C

Finally, the state challenges the holding of the court of appeals that Gillard's post-arrest silence was used against him, in violation of *Doyle v. Ohio* (1976), 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91.

Canton Detective Sergeant Michael O'Brien testified that he talked to Gillard in Wellsburg, West Virginia, on January 4, 1985. O'Brien advised Gillard of his constitutional rights and said that he had two warrants for Gillard's arrest. O'Brien testified that Gillard said "that the Canton Police Department was barking up the wrong tree * * * and that the shootings in question had been over a drug deal that had gone sour." O'Brien "asked him to provide details of that to corroborate * * * or to further clarify that statement or who might have been involved and so forth." Gillard refused: "He said *I don't want to talk any more.*" (Emphasis added.)

On January 8, Gillard was returned in police custody to Canton, taken to the police department, and informed of his rights again. After expressing his willingness to talk, he was interrogated by Detective Sergeants Jerry Steiner and Jerry Reynolds. According to Steiner, Gillard " * * * shook his head in the negative and says I really don't know * * * what's going on here * * * but I was at a New Year's Eve Party * * * when this all happened." Steiner asked him where the party had been and who had been there "and [said] we'll definitely check this out and clear you if we have the wrong person. He stated no, never mind, and he would not give me the location of the party or the names of anyone that was at the party." (Emphasis added.)

The defendant argues that this testimony by O'Brien and Steiner violated *Doyle*. The state argues that this testimony did not use Gillard's post-arrest silence against him. Because Gillard did not remain silent, but freely gave his alibi, it was proper to inform the jury that he refused to give details to corroborate that alibi. We agree.

In *State v. Osborne* (1977), 50 Ohio St.2d 211, 4 O.O.3d 406, 364 N.E.2d 216, we noted that *Doyle* emphasized the unfairness of inviting a defendant to rely on the *Miranda*[2] warnings' implied promise that his silence cannot be used against him, and then, in fact, using his silence against him. However, we added, a defendant who chooses to talk has not relied on that promise with respect to what he talks about. "If a defendant voluntarily offers information to police, his toying with the authorities by allegedly telling only part of his story is certainly not protected by *Miranda* or *Doyle*." *Osborne*,

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[2] *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.

supra, 50 Ohio St.2d at 216, 4 O.O.3d at 409, 364 N.E.2d at 220.

The United States Supreme Court has, we believe, confirmed our reading of *Doyle*. In *Anderson v. Charles* (1980), 447 U.S. 404, 100 S.Ct. 2180, 65 L.Ed.2d 222, the court rejected a "formalistic understanding of 'silence'" whereby "[e]ach of two inconsistent descriptions of events may be said to involve 'silence' insofar as it omits facts included in the other version." *Id.* at 409, 100 S.Ct. at 2182. Anderson is distinguishable from the case at bar in that Gillard's post-arrest statements are not inconsistent with his trial testimony. However, the Sixth Circuit has rejected such a narrow reading of *Anderson*. *United States v. Crowder* (C.A.6, 1983), 719 F.2d 166, 172 (*en banc*).

Moreover, *Anderson* approvingly cited *United States v. Goldman* (C.A.1, 1977), 563 F.2d 501, a case virtually on all fours with this case. Like Gillard, Goldman "chose to make an exculpatory statement * * *." *Goldman*, *supra*, at 503. Thus, Goldman could not claim that he relied on *Miranda* warnings, and his refusal to give the names of people to whom he referred in his story and who could have corroborated his statement could be used to discredit that statement. "If [a defendant] talks, what he says *or omits* is to be judged on its merits or demerits, and not on some artificial standard that only the part that helps him can be later referred to." (Emphasis added.) *Vitali v. United States* (C.A.1, 1967), 383 F.2d 121, 123, quoted in Goldman at 503.

Clearly, *Doyle* was not violated here. The state's second proposition of law is sustained.

III

In its third proposition of law, the state argues that it was not misconduct for the prosecutor to discuss the possibility that William Gillard and Tim Fohrenbach may be indicted.

During voir dire, the prosecutor told the veniremen that the evidence would show "that this defendant's brother, William Gillard, and a friend of his by the name of Tim Fohrenbach were also involved in these crimes. However, they have not yet been indicted. * * * They are still under investigation." She went on to ask: "Do you all understand and accept that there is only one person on trial in this courtroom and it is this defendant, John Gillard?"

While cross-examining William Gillard, the prosecutor asked: "You understand that the Grand Jury * * * is still at this time considering evidence against you?" According to the court of appeals, these statements and questions implied to the jury that the prosecutor knew facts outside the evidence and the issues in the trial.

The jury might have drawn from such statements the inference that William Gillard and Tim Fohrenbach were also involved in the murder. However, their involvement was relevant to the issues at trial and evidence of it was introduced. We see no prejudice to John Gillard. Accordingly, the state's third proposition of law is sustained.

IV

The state argues, in its fourth proposition of law, that the admission of testimony regarding John Gillard's firing of a gun two weeks before the murders, if error at all, was not plain error.

The state introduced evidence that Gillard had fired a .380 automatic into a wall inside the Fireball Express, a bar in Canton, in December 1984, approximately two weeks before the murders. This was relevant because, in April 1985, a .380 caliber casing was found at the Fireball Express. That casing was ejected from the same gun that ejected the casings found at the murder scene. The state argued that the casing found at the bar came from the gun Gillard used in December, and that Gillard's gun was therefore the murder weapon.

Although agreeing that this testimony was relevant, the appellate court held that the state elicited "excessive detail showing the accused to be generally a vicious and dangerous man."

Timothy Steph, the owner of the Fireball Express, testified that he asked Gillard to pay for some chairs that he had broken in a previous fight; that Gillard responded by grabbing Steph in a headlock while someone else hit him in the face; that Scott Dryden went to Steph's defense; and that when Steph left the bar, the fight ended.

Dryden testified that, about an hour and a half to two hours later, a second fight broke out. Gillard, saying "I'll break this up," pulled an automatic pistol and fired it into the air. Leroy Ensign grabbed Gillard, restraining him. Gillard kept the gun, which Dryden identified as a .380 caliber automatic.

Bernadean Davlin's testimony differed from Dryden's in one significant respect. Davlin testified that Gillard pointed the gun at someone and was going to shoot him when Ensign grabbed his hand and held it up in the air.

Davlin's testimony depicts Gillard in a bad light since it suggests that Gillard was about to kill the other person. However, because it was Ensign, one of the victims in this case, who kept him from shooting, the testimony was obviously relevant to motive.

The testimony regarding Gillard's attack on Steph, however, was irrelevant and tended to portray him as a violent man. However, Gillard failed to object to this testimony, and we decline to hold it plain error. Evidence of his involvement in a mere barroom brawl cannot be seen as highly prejudicial where he already stood accused of two aggravated murders. The state's fourth proposition of law is sustained.

V

In its fifth proposition of law, the state asserts that it properly cross-examined defense witness William Gillard on his conviction of discharging a firearm within the Canton city limits.

The state introduced testimony that William Gillard had fired a handgun into the air at 213 Kennet Court before the murders. The state's theory was that he did so to find out whether the sound of gunfire would draw the attention of the police. On direct examination, William Gillard denied possessing a gun at any time on December 31 or January 1.

The prosecutor asked William Gillard on cross-examination whether "in fact you plead [*sic*] and were found guilty of * * * firing that same shot * * * that Mr. Postlewaite [*sic*] testified to." The court overruled an objection on the ground that the direct examination had opened the subject. William Gillard was then asked whether

he had been found guilty of discharging a firearm and whether he had been jailed upon his conviction.

Crim.R. 11(B)(2) did not bar this attempt to use the no contest plea. That rule provides that a plea of no contest "is not an admission of [the defendant's] guilt * * * and * * * shall not be used *against the defendant* in any subsequent civil or criminal proceeding." (Emphasis added.) This clearly refers to "the defendant" who entered the plea--in this case, William Gillard. The plea was not used "against him," as he was not a party to this litigation.

The court of appeals noted that the state elicited an admission from William Gillard that he was jailed after the finding of guilt. This was irrelevant. However, the error was clearly harmless, since William Gillard had already admitted that he had been convicted of the charge.

The court of appeals also observed that William Gillard had earlier been asked whether he knew that the grand jury was still investigating him and whether John Gillard's attorney had represented him at the preliminary hearing. As the state emphasizes, however, defense objections to both questions were sustained. Moreover, the court instructed the jury to disregard the first question and admonished the prosecutor in the jury's presence after the second. We find no prejudice to Gillard, and accordingly sustain the state's fifth proposition of law.

VI

In its sixth proposition of law, the state argues that the trial court was not required to declare a mistrial *sua sponte*. This proposition of law appears to refer to that portion of the appellate court's opinion dealing with, *inter alia*, Gillard's

ninth assignment of error below, which challenged the trial court's failure to act *sua sponte* to control alleged prosecutorial misconduct. In addressing that assignment of error with several others, the court of appeals held that certain unspecified rulings that ordinarily would have been within the discretion of the trial court were prejudicial error in this case because they might have been "influenced by the information furnished to the trial court" by the state under Crim.R. 16(B)(1)(e). (*See* our discussion of the state's first proposition of law, *supra*.)

We cannot agree. Since the record does not indicate that any of the court's rulings were affected by this information, we presume that none was. *State v. Post*, *supra*. The state's sixth proposition of law is therefore sustained.

VII

In Gillard's first proposition of law on cross-appeal, he argues that the court, the prosecutor, and his own counsel violated his rights by informing the jury that its verdict of death would be only a recommendation that the court would not have to follow. We have repeatedly rejected this argument. *See*, *e.g.*, *State v. Clark* (1988), 38 Ohio St.3d 252, 259, 527 N.E.2d 844, 852. We summarily overrule it here. *See State v. Poindexter* (1988), 36 Ohio St.3d 1, 3, 520 N.E.2d 568, 570.

VIII

In his second proposition of law, Gillard argues that his trial counsel was ineffective in the penalty phase of the trial.

A defendant claiming ineffective assistance of counsel must show that counsel's performance was deficient and that

the deficiency caused prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674. Prejudice exists where it is reasonably probable that the result would have been otherwise absent the alleged errors; a reasonable probability is one sufficient to undermine confidence in the outcome. *Strickland v. Washington*, *supra*, at 694, 104 S.Ct. at 2068.

After Gillard was convicted, counsel continued to insist that he was innocent and presented no other mitigating factors. This strategy was within the "wide range of reasonable professional assistance." *Strickland v. Washington*, *supra*, at 689, 104 S.Ct. at 2065. "Residual doubts" of a capital defendant's guilt are properly considered in mitigation. *Lockhart v. McCree* (1986), 476 U.S. 162, 181, 106 S.Ct. 1758, 1768, 90 L.Ed.2d 137; accord *State v. Buell* (1986), 22 Ohio St.3d 124, 142, 22 OBR 203, 218-219, 489 N.E.2d 795, 811. The record does not show that there were any other mitigating factors for counsel to present, nor does it show that counsel failed to look for them.

Thus, Gillard's attempt to compare this case to *State v. Johnson* (1986), 24 Ohio St.3d 87, 24 OBR 282, 494 N.E.2d 1061, fails. In *Johnson*, the record showed a complete failure to investigate. We will not infer such a failure solely from the presentation of no mitigating factors. Indeed, we emphasized in *Johnson* that "the mere failure to present mitigating evidence at the penalty phase of a capital trial does not itself constitute proof of ineffective assistance of counsel * * *." *Id.* at 91, 24 OBR at 286, 494 N.E.2d at 1065.

Gillard also notes that counsel did not object when the state offered all the exhibits admitted in the guilt phase to be readmitted in the penalty phase. However, such an objection

would not have been well-taken. *See State v. DePew* (1988), 38 Ohio St.3d 275, 282-283, 528 N.E.2d 542, 552.

Gillard states that counsel expressed support for the existence of the death penalty. However, this argument may well have enhanced counsel's credibility with the jury.

We find no deficiency in counsel's performance; therefore, Gillard's second proposition of law is overruled.

IX

Having reversed the judgment of the court of appeals, we remand this cause so that court can perform its independent review of the appropriateness and proportionality of the death penalty.

A capital defendant, under R.C. 2929.05, has a right to independent review by both the intermediate appellate court and the Supreme Court. *See State v. Maurer* (1984), 15 Ohio St.3d 239, 15 OBR 379, 473 N.E.2d 768, paragraph four of the syllabus. "[T]he multi-tiered review structure * * * eliminates the arbitrary imposition of the death penalty." *State v. Glenn* (1986), 28 Ohio St.3d 451, 453, 28 OBR 501, 502, 504 N.E.2d 701, 705. Since Gillard has not yet had the safeguard of independent review by the court of appeals, we must remand the cause to that court with instructions to perform such review.

Judgment reversed and cause remanded.

SWEENEY, LOCHER, DOUGLAS, WRIGHT and HERBERT R. BROWN, JJ., concur.

HOLMES, J., concurs in the judgment.

HOLMES, Justice, concurring in the judgment.

I would concur in the judgment of the majority in reversal of the court of appeals. However, I would reinstate the judgment of the trial court.

APPENDIX L

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

Case No. CA-6701

[Filed January 21, 1987]

STATE OF OHIO,
Plaintiff-Appellee

vs.

JOHN GRANT GILLARD,
Defendant-Appellant

Criminal Appeal from the
Court of Common Pleas
Case No. 85-5023

JUDGES: Hon. Norman J. Putman, P.J., Hon. John R. Milligan, J., Hon. Earle E. Wise, J.

OPINION

PUTMAN, P.J.

Due Process of law requires not only the fact of fairness and impartiality, but also the appearance of each of them.

Trials must not only be fair, they must appear to be fair. Judges must not only be impartial they must appear to be impartial. The objective events in this case destroy the appearance of impartiality. The claim that everyone acted in good faith misses the point. Neither the fact that everyone acted in good faith, nor our willingness to believe that they did so, weigh in the balance. What is critical is the potential for prejudice.

This death-penalty case got off to a bad start and steadily went downhill. There were several hundred Ohio trial judges eligible to preside over it. The record does not explain why the original trial assignment fell to the Honorable James R. Unger who had been prosecuting attorney of the county at the time of the savage, brutal, execution style killings involved in the indictment. There were three other general division judges in Stark County who could have been originally assigned.

Given the fact of that improvident original assignment, it was inescapable that any competent defense lawyer would feel obligated to challenge the eligibility of Judge Unger to sit unless he voluntarily stepped aside. Notwithstanding the manifest awkwardness of this unfortunate original assignment, Judge Unger elected not to voluntarily stand aside (recuse himself). This obligated the defense lawyer to challenge Judge Unger's status eligibility to preside.

Procedurally, this necessitated the filing of what is called "An Affidavit of Prejudice" against Judge Unger by defense counsel with the Chief Justice of Ohio. To have failed to so do, surely would have cast defense counsel in the posture of less than zealous, if not "ineffective" in the constitutional sense, a fact obvious to all experienced practitioners. In the face of this obligatory *pro forma* challenge, Judge Unger persevered in his refusal to "recuse himself voluntarily.

Instead, he apparently enlisted the support of assistant prosecuting attorney Ms. Alicia Wyler, who for years had been an assistant appointed by James R. Unger when he was the prosecuting attorney. Ms. Wyler was already actively engaged in the prosecution of the instant case.

Ms. Wyler filed an affidavit (see photocopy attached) in support of her former boss, now Judge Unger, with the Chief Justice of Ohio, who, under the Ohio Constitution, decides the issue of whether a particular judge, when challenged, may sit in a specific case. Ms. Wyler swore, *inter alia*, that to the best of her recollection, James R. Unger, as prosecutor, never talked to her, his assistant, about the case at bar and that he took no part in the investigation of the crimes charged in the indictment.

Unfortunately, at the outset, this created at the least an appearance of a community of interest between the trial judge and the assistant prosecutor who was engaged in the trial of the case. Defense counsel found himself doing battle against the trial judge and prosecution counsel "lined up" together against him on the opposite side of the issue. The trial judge appeared to be fighting to stay in the case and being given aid by his former associate, the assistant prosecutor, who would try the case against the defense counsel should he, Judge Unger, win his point. Judge Unger still elected not to recuse himself. Accordingly, the issue of whether Judge Unger should preside went to the Chief Justice of Ohio for determination upon Ms. Wyler's affidavit. The Chief Justice overruled the challenge and Judge Unger presided.

Thereafter, during *voir dire*, the preliminary examination of prospective jurors, and over strenuous objection by defense counsel. Judge Unger excluded the defendant, his counsel, the public and press when he heard from Ms. Wyler *ex parte* five

pages of unsubstantiated, severely damaging representations about the accused. These included, but were not limited to, threats to a State's witness linked to the accused and his associates. For the remainder of the trial, this placed Assistant Prosecutor Alicia Wyler and the trial judge together in an apparent lineup against the defense lawyer in what might reasonably be described as a "We know something that you don't know" situation because the record of these *ex parte* representations were "sealed only to be opened upon appellate review."

Using these *ex parte* representations as a basis for his decision, Judge Unger then made an official order excluding the public and press from a perpetuation of testimony proceeding over which he personally presided, with the defendant and his counsel present. Once again, Judge Unger and Assistant Prosecutor Alicia Wyler appeared to be united in interest. This time to exclude the public and the press. The exclusion of the press from the judge's proceedings led to a highly publicized lawsuit in which the Stark County Prosecutor's office participated representing Judge Unger, and the unsequestered prospective jurors were exposed to the public accounts thereof. With no jury yet having been impaneled and sworn, meaning that the accused was not yet in jeopardy, Judge Unger elected neither voluntarily to stand aside, nor to inform the Chief Justice of Ohio about the nature of the *ex parte* representations that had been made to him by Ms. Wyler. Defense counsel could not tell the Chief Justice about them via a renewed challenge of Judge Unger, because Judge Unger had excluded the defendant and his counsel and sealed the record.

Against this background, it came to pass thereafter that a jury was empaneled and sworn. Judge Unger presided over the hotly contested trial making the many difficult, highly

discretionary evidentiary and procedural decisions in the guilt phase of the trial. Included therein was Ms. Wyler's point-by-point cross-examination of the accused, over objection about many of the unproved assertions she had communicated to Judge Unger *ex parte*. Each drew a categorical denial. Then both the defense and the prosecution promptly rested. The prosecution made no attempt to show good faith in the asking of the questions by any record demonstration that any evidentiary basis for them had existed. The renewed mistrial motion was overruled. Volume One - Sixth Week of Trial, p.4, 11.7-12.

The cold record affirmatively shows that:

first, it required the conscious combined efforts of both Judge Unger and Assistant prosecutor Alicia Wyler to keep Judge Unger in the case over the defendant's objection;

secondly, the same conscious combined efforts to exclude both the accused and his counsel over their objections from an important part of the pre-trial proceedings (the five pages of *ex parte* unproved damaging assertions about the accused and his associates made by Ms. Wyler to Judge Unger;

thirdly, the same conscious combined efforts, over express defense objection, to exclude the public and the press from the separate testimony perpetuation portion of the pre-trial proceedings presided over by Judge Unger;

and fourthly, the same conscious combined efforts to permit, over defense objection, the placing of unproved damaging assertions before the trial jury by Ms. Wyler in the form of her prosecution cross-examination questions to the testifying defendant as to facts not in evidence and never thereafter demonstrated to have had any evidentiary basis.

If the trial court was, as suggested, "placed squarely on the horns of a dilemma" (respecting that part of the procedure that took place before the jury was finally selected, impaneled prosecution and sworn), he was placed there intentionally by the prosecution whose motivations, "sinister" or otherwise, did not stop them when it suited their purpose from going to Judge Morris on April 22, 1985, and securing an order compelling the accused to give blood and saliva samples to be used to help send him to his death.

Judge Unger easily could have "sidestepped the horns" by sending Ms. Wyler to Judge Morris when she first announced that what she intended to say would require a "sealed record."

Nothing appears that would have prevented the prosecution from selecting Judge Morris or some other judge to make their so-called "certification" record except their apparent desire to influence the trial judge with these "sealed" revelations. The rule neither requires, nor expressly authorizes, the actual trial judge to hear pre-trial *ex parte* representations. In our opinion, they were totally unwarranted because of the defense withdrawal of the discovery motion.

The claim that the prosecution, in good faith, understood the Supreme Court rules to require them to "make a record," does not respond to the evil inherent in going to Judge Unger rather than to Judge Morris to make it. Their so-called "certification hearing" representations could have been made to Judge Morris, or some other judge. The same is true of the perpetuation of testimony. The record makes it appear that concern for their own convenience was of sufficient value to steer the prosecution to Judge Morris for a pre-trial order, but concern for the constitutional rights of the accused was not.

No amount of labored apologia can obscure the fact. It shines through his record as the proverbial "new silver dollar in a mud puddle." Failure to go back again to Judge Morris, or seek out any other judge to make their so-called "certification" *ex parte* representations for the record, "to be sealed until appeallate review" creates the unfortunate appearance of intentional foul play calculated to gain forensic advantage. In the name of common sense fair play, if the information was so "hot" that the record had to be sealed, wasn't the first priority to seal it from the trial judge? Records are sealed to keep non-evidentiary information from jurors. The Ohio trial judge is actually a "super juror" in a death-penalty case. Upon conviction and recommendation, he decides life or death, and upon a much broader range of facts than may lawfully be considered by the jury upon the issue of guilt or innocence.

In summary, giving thoughtful consideration to the awesome finality of the death penalty, the entire procedural quagmire, as well as the apologia constructed for it, strikes us as being patently inappropriate. In our opinion, the denial of the right of the accused to be present during the *ex parte* assertions made to Judge Unger by Ms. Wyler, coupled with the placing of much of the same information before the jury via unproved damaging testimonial assertions in the guise of Ms. Wyler's cross-examination questions put to the accused, over defense objection, violated constitutional absolutes.

Upon conviction having been returned, Judge Unger decided to follow the jury's recommendation to sentence the accused to death.

Our consideration of the assignment of error going to the eligibility of that judge to serve is precluded by the Ohio Supreme Court case of *State v. Rogers* (1085), 17 Ohio St.3d

174, 186 (stating that the ruling of the Chief Justice upon eligibility to sit is made conclusive by the Ohio Constitution, Article IV, Section 5(C)). See Annot., "Prior Representation or Activity as Prosecuting Attorney as Disqualifying Judge From Sitting or Acting in Criminal Case," 16 A.L.R.4th 550 (1982).

We reverse the conviction and remand the case to the trial court for certain substantial errors of constitutional magnitude that destroy the reliability of the truth-finding process at the guilt determination level of the bifurcated capital case proceeding.

Accordingly, we do not reach a determination of the appropriateness of the death penalty. However, it has never been claimed that death was an inappropriate penalty for the double slaying shown by the evidence, whoever was guilty.

The accused was convicted largely upon the testimony of a third shooting victim who survived. His credibility was a central issue at trial. Substantial alibi testimony was received and the accused testified in his own defense. Accordingly, the credibility of the accused was also a central issue.

The determination of the credibility of the witnesses was made under circumstances that, in our opinion, fall far short of minimum constitutional requirements

Before we separately address the assignments of error, we make the following points.

NUMBER ONE

This deals with a part of assignment of error Roman Two.

First of all, the fundamental constitutional right of the accused to be present at all important stages of a death penalty case was abridged. This alone requires reversal. *Illinois v. Allen* (1970), 397 U.S. 337; 25 L.Ed.2d 353, *see* annotation at p.931. Probably the confusion over the Ohio Criminal Rules would not have occurred had the responsible authorities kept their eyes upon the "pole star" of the right of the accused to be present. *See Hopt v. Utah* (1884), 110 U.S. 574, 28 L.Ed. 262.

When the assistant prosecutor, articulated to the trial judge a long litany of other crimes and misdeeds of the accused, as well as various threats to the witness which were directly and indirectly linked to the accused, neither the accused nor his counsel were permitted to be present. In our opinion, under the totality of the circumstances, this was an important "stage of the trial" at which the presence of the accused was mandated by the confrontation provisions of the constitutions of Ohio and the United States.

A brief history of the proceedings will illuminate this point.

Leroy Ensign and Denise Maxwell were killed and Ron Postlethwaite was wounded at 213 Kennet Court, Canton, Stark County, Ohio, about 4:00 A.M., January 1, 1985. James R. Unger was Prosecuting Attorney. On January 4, 1985, he became one of seven Common Pleas Judges for Stark County.

On February 13, 1985, Ron Webb, a critical State's witness to an alleged confession by the accused to a civilian, testified before the Stark county Grand Jury. T.121-122.

On March 11, 1985, John Grant Gillard was indicted by the Stark County Grand Jury for the January 1, 1985 killings, and on March 13, 1985, Gillard was arraigned.

On March 20, 1985, the defense requested discovery of the names of witnesses the State intended to call.

On April 8, 1985, the defense filed an affidavit of prejudice asking Judge Unger to step aside. The fact of this filing temporarily took Judge Unger out of the case, a fact of which the Chief Justice of Ohio notified all parties by letter filed April 24, 1985, and

On April 9, 1985, Ms. Alicia Wyler filed an affidavit supporting Judge Unger. *See* photocopy.

On April 22, 1985, Judge William R. Morris ordered the accused to give blood and saliva samples.

April 23, 1985, the State filed a supplemental discovery list of 44 witnesses' names, not including Ron Webb.

On April 24, 1985, the letter from Chief Justice Frank Celebrezze directing no further action be taken pending the disposition of the disqualification motion was filed with the Stark County Clerk of Courts.

On April 25, 1985, Judge Unger referred "all urgent matters in the case to the presiding criminal judge" by letter filed with the Clerk.

On April 26, 1985, the prosecutor moved the court "pursuant to Crim. R. 16(C)... to perpetuate the testimony of certain *certified* witnesses in hearing before said court." (Emphasis ours).

On April 29, 1985, the defense filed a notice of alibi.

On April 30, 1985, the defense withdrew its motion to compel the prosecution to disclose witnesses' names for the following stated purpose:

> Now comes the Defendant, John Gillard, by and through counsel, and states to the Court that on April 8, 1985 that he filed a Motion to Compel the State to Disclose the names of Witnesses that the State intends to call at trial. Defendant hereby withdraws that Motion so that the testimony of the certified witnesses shall be perpetuated and subject to cross-examination in the open court, and need not be taken by means of deposition.

On May 2, 1985, the Chief Justice of Ohio overruled the defense motion to disqualify Judge Unger, and his judgment to that effect was filed May 6, 1985, at 12:29 P.M. with the Stark County Clerk of Courts.

On May 3, 1985, the State requested the court to conduct an in-camera certification hearing to be held May 6, 1985, the day scheduled for defendant's trial, with only a court reporter and the State attorneys present, to determine whether disclosure of the names and addresses of certain witnesses for the State would "in fact put those witnesses lives in danger, and/or result in those witnesses being coerced into either not testifying, fleeing from the jurisdiction of this court or changing their testimony." T.4, 5, & 7 of the proceedings held before the court on May 3, 1985.

The State further requested the witnesses' testimony "perpetuated" by means of a videotape deposition, with defense counsel and defendant present, affording the defendant the right to cross-examine the witnesses, if the trial

court chose to "certify" the witnesses. T.6 & 8. The defendant insisted that he be present at any hearing, and permitted, through his attorneys, to cross-examine the State witnesses. The trial court, at T.14, sustained the motion of the State to certify the witnesses "through the process which has been outlined by the State," thus precluding defendant and his attorneys from being present and participating at the certification hearing.

The trial court also sustained the State's motion to perpetuate the testimony of the witnesses if those witnesses were certified. The testimony would be perpetuated by means of deposition in the presence, and with the participation of, defense counsel and defendant. T.14.

Defendant's trial commenced May, 1985. On that day, at the conclusion of the general *voir dire* of the entire panel of jurors, the State moved the trial court to conduct the certification hearing and to "meet with the Judge and the court reporter in chambers and privately speak into the record the reasons as to why the Prosecuting Attorney has reason to certify certain witnesses, and then to have the record sealed and to be opened only for purposes of appellate procedure." T.112, Volume One–First Week of Trial.

Defense counsel again requested the trial court for permission to be present, along with the defendant, at the certification hearing.

What followed is photocopied (T.111-124) and appended hereto. It shows that thereafter the trial court informed the Canton Repository in open court (T.116) that the certification motion had already been sustained last Friday morning (T.119 11.7-11), that the court would now "proceed to the certification" and if the motion is substantiated by the

substance of the certification, will move to the deposition (T.12, 11.14-17). *See State, ex rel. The Repository v. Unger* (1986), ___ Ohio St.3d ___, decided December 30, 1986, Supreme Court No. 85-1718.

Thereafter in the defendant's absence and over his objection, the court heard four pages (T.120-124 photocopied and attached) and made two official rulings based thereon (T.124, 11.7 & 13). With that procedural background, we proceed to the point.

There are no unimportant states of court proceedings that have as their object the taking of the life of a human being. *Shields v. U.S.* (1927), 273 U.S. 583; *Geders v. U.S.* (1976), 425 U.S. 80; *Ferguson v. Georgia* (1961), 365 U.S. 570; *Faretta v. California* (1975), 422 U.S. 806, 816; *Snyde v. Massachusetts* (1934), 291 U.S. 97.

We have considered the cases of *State v. Williams* (1986), 23 Ohio St.3d 16, and *State v. Owens* (1975), 51 Ohio App.2d 132. *Owens* tried in the interim when there was no death penalty and the court, dealing with relief from discovery, said at p. 146:

> We find no error in holding such an in-camera hearing with only the prosecutor present. W do declare, however, that the failure to hold such a hearing "on the record" is erroneous as it precludes the issue from being properly reviewed on appeal. See, Criminal Rule 16 (E)(1) and ABA Standards, Discovery and Procedure before Trial, Section 4.6 (1970). Under the circumstances of this case, however, the error is not prejudicial. We reject assignment of error No. 3.

We do not here deal with relief from discovery. We think *Owens* must be limited to its facts. We repeat that there was no record in *Owens* of what was said to the trial judge, and the *Owens* court did say that that was error. We suggest that the *Owens* court would have found much error if they had our record to read.

In *Williams*, *supra*, the Ohio Supreme Court in a death penalty case said at p.18 of 23 Ohio St.3d:

> In his third proposition of law appellant argues that he was denied his right to confront witnesses by the trial court's protective order as to two of the state's witnesses. Confrontational rights are guaranteed to an accused through the Sixth and Fourteenth Amendments to the United States Constitution, *Pointer v. Texas* (1965), 380 U.S. 400, and by Section 120 Article I of the Ohio Constitution. Such rights are legitimately constrained by Crim. R.16(B)(1)(e) which provides the trial court with authority to forbid disclosure of the names and addresses of witnesses "if the prosecuting attorney certifies to the court that to do so may subject the witness or others to physical or substantial economic harm or coercion." Certification is not satisfied by the prosecutor merely stating his or her conclusion that a witness might be subject to harm, but requires the state's reasons for requesting witness protection to appear on the record. *State v. Owens* (1975), 51 0hio App.2d 132, 147 [5 O.O.3d 109]. The reasons for withholding the identity of the state's witnesses who were also incarcerated in the Cuyahoga County Jail at the time, i.e., the high risk of repercussions for producing evidence against a fellow prisoner, do appear on the record. In any event, these witnesses' identities were not absolutely

> withheld, as they were present at the trial and subject to cross-examination. Appellant has failed to show the sufficient degree of prejudice to his ability to defend himself required for a conviction reversal (*State v. Parson* [1983], 6 Ohio St. 3d 442, syllabus), given his failure to exercise the options offered by the trial court of requesting indefinite continuances and using investigators to prepare his cross-examination.

We distinguish *Williams* because it dealt with the pre-trial right to prepare. Here we face the right of the accused to be present when the damaging facts about him personally were given to the trial judge during *voir dire*. Nothing in *Williams* leads us to believe that the problem of the kind of *ex parte* communication to the trial court that we have here was raised in the *Williams* trial court or considered by the Supreme Court in *Williams*.

In the case *sub judice*, what was told to the trial judge *ex parte* about the accused was devastating. Much of the information was related to the threat to the witness and unessential to the stated propose of the *ex parte* communication. Most of it was disparaging to the accused, and was never proved at trial. It was later picked up and repeated to the jury in the prosecutor's cross-examination of the accused over defense objection with the approval of the trial judge.

It totally misses the mark to argue that certain sections of the general Ohio Criminal Rules, adopted when Ohio had no bifurcated death penalty statute in which the judge decides life or death, authorize what took place in this record. We do not read such authorization to be in the rules, and an application of the rules so as to permit what happened here is prohibited

by the confrontation and due process clauses of both state and federal constitutions.

Crim. R. 16(E)(1) provides:

> (1) Protective orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by a party the court may permit a party to make such showing, or part of such showing, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such a showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

In the case at bar, there was no discovery to be protected from after the demand for discovery had been withdrawn. The rule is labeled "regulation of discovery." Discovery is peculiarly and inherently a pre-trial phenomenon. It deals with disclosure of evidence sufficiently in advance of trial to allow the adversary to prepare. Even where appropriate, Crim. R. 16(E)(1) inherently involves risk of disqualification of the judge from presiding at the merit trial. Otherwise the rule cannot pass constitutional muster. It all depends upon what facts are sealed until review, and decisions must be made on a case-by-case basis.

The claim that the prosecution needed to show the trial judge, *ex parte*, reasons why the disclosure had not been previously made in order to be entitled to disclose the witness' identity by a perpetuation of testimony proceeding is antithetical. Moreover, Crim. R. 16(B)(1)(c) authorizing

perpetuation neither authorizes nor requires the *ex parte* inspection of written materials provided for in Crim. R. 16(E)(1) dealing with protective orders under regulation of discovery.

It is conceded that perpetuation of the testiony would strongly tend to protect the witness for anyone sophisticated enough to appreciate that his assassination would not prevent his testimony from being used against the accused. However, *ex parte* communication by the prosecutor to the trial judge is not a pre-condition to the right of the state to perpetuate the testimony.

"Certification" deals with avoiding sanctions for non-disclosure, and the defense had waived sanctions by withdrawing its motion to compel pre-trial disclosure. Although there may have been need to perpetuation of testimony, there was no need for *ex parte* communication with the trial judge in order to be entitled to it.

Generally speaking, the Ohio rules require the prosecution to disclose pre-trial the names of the witnesses it intends to call at trial. In this case, the witness Webb gave Grand Jury testimony. Weeks had gone by and no disclosure of Webb's identity had been made.

Pre-trial non-disclosure had already been accomplished. The pre-trial period had in fact ended and the witness' identity was not yet disclosed. Jury selection questions were nearly completed. In reality, disclosure of the witness' identity by perpetuation of testimony at which the defendant and counsel would be present was the object of the motion before the court. No evidentiary showing is required to entitle the State to perpetuate testimony.

> Where a motion for discovery of the names and addresses of witnesses has been made by a defendant, the prosecuting attorney may move the court to perpetuate the testimony of such witnesses in a hearing before the court, in which hearing the defendant shall have the right of cross-examination. A record of the witness' testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state. (Crim. R. 16(B)(1)(e)).

Furthermore, Crim. R. 16(E)(1) is a pre-trial rule and does not expressly authorize *ex parte* communication to the judge who later tries the case. The only reasonable interpretation in those capital cases where the accused is personally disparaged *ex parte* is that the rule must be limited to a different judge from the one who later tries the case.

Manifestly, these Crim. R. 16(E)(1) *ex parte* written representations are contemplated to be made substantially in advance of start of the trial, i.e., during "discovery." In such cases, the "motion" judge knows the quality of the factual representations long before the trial starts.

This affords ample time for other arrangements to be made for a different judge to try the case where the nature of the representations is such, as here, as to raise the issue of the appearance of reasonable possibility of adverse influence upon the impartiality of the pre-trial judge. The point is that the pre-trial Crim. R. 16(E)(1) "relief from discovery" judge may, in many cases, be disqualified by having heard and acted upon the *ex parte* representations. Compare the case of immunity grants involving value judgments upon the guilt of the accused and the credibility of the immunized witness.

In all such cases, it would be prudent for the prosecutor to warn the judge of the prejudicial nature of the information before he attempts to give it, and it is the duty of the trial judge, especially in capital cases, to forbid and prohibit any and all *ex parte* communication.

It is our view that once the particular *ex parte* disclosures were made in this case, and the trial court had made an order in connection therewith, he was obligated to step aside. This is especially significant in the face of the prior challenge to his ability to sit that had been made and overruled.

The trial judge had acted upon them as a reason to bar the press and public from the testimony perpetuation. *See State, ex rel. The repository v. Unger, supra.*

This discussion assumes that an application for "relief from discovery" under Crim. R. 16(E)(1) was appropriate and could have been sough in good faith. In point of fact, we find it to have been totally inappropriate, given the withdrawal of the defendant's discovery demand.

We are sorely troubled about the constitutionality of *ex parte* representations to the eventual trial judge in any criminal case, capital cases especially. We find Crim. R. 16(E)(1) was never contemplated to apply to trial judges in capital cases and was inapposite on May 6, 1985, the trial having started, and the defendant having withdrawn his request for disclosure of the names of further witnesses. Here, the *ex parte* representations were as to facts that weigh in the balance upon the issue of mitigation in the penalty phase and the credibility of the accused where he takes the stand to testify in his merit defense in the guilt phase of the capital trial.

The prejudice is manifest.

The Ohio death penalty statute was enacted after the Ohio Criminal Rules were adopted. There was no bifurcated criminal trial at the time the rules were conceived. An interpretation of the rule so as to authorize what happened here, would be unconstitutional.

We recognize that the trial judge had no way to know what the prosecutor intended to tell him *ex parte*, but he knew he would have to decide penalty in case of conviction and should have refused to hear *ex parte* assertions. The prosecutor had a duty to recognize that what was coming was prejudicial and gone to another judge, as they went to judge Morris on April 22, to compel the accused to give blood and saliva samples. After the *ex parte* disclosures were made, the jury had not yet been impanelled and sworn. The accused was not yet in jeopardy. The trial judge could have then stepped aside. He could have simply acceded to the prior request that he do so.

Under the procedure employed here, neither the accused nor his counsel ever knew what the trial judge had been told. They went through the entire trial unaware of the facts that had been conveyed to the trial judge; facts that stood totally without proof at the end of the trial. Such a procedure is the antithesis of adversary. Confrontation was absent. Forensic disadvantage is obvious.

In summary, the prosecutor's right to perpetuate testimony under Crim. R. 16(B)(1)(e) is triggered by the defense demand for the discovery of the identity of witnesses. By perpetuating testimony, the State gives up its right to not disclose the identity of the witness because the accused and counsel faced the witness during perpetuation. This has

nothing to do with certification. Certification seeks the further concealment of the identity of the witness.

Likewise, the "written statement to be inspected by the trial judge alone" is a feature of Crim. R. 16(E)(1) to be employed where the State desires to preserve in maintaining the secrecy of the identity of the witness.

The prosecutor had confused these points and the defense saw what was coming. Hence, the defense withdrew its motion to compel the State to disclose the identity of the witness, manifestly hoping to avoid the closed proceedings, *ex parte* and otherwise.

That left the State free to follow Crim. R. 15 and take the deposition of the witness without the judge present. The judge does not attend a Crim. R. 15 deposition. The judge does attend a Crim. R. 16(B)(1)(e) perpetuation of testimony proceeding.

But there is no perpetuation proceeding under Crim. R. 16(E)(1) where relief from discovery is sought by having the trial "judge alone" inspect a "written statement." The object of Crim. R. 16(E)(1) is to continue to conceal the identity of the witness. A critical indication that the prosecution was not contemplating Crim. R. 16(E)(1) is that it did not employ a "written statement."

When the defense withdrew its request for discovery on April 30, 1985, there was no need further to "certify" *ex parte* the already certified and undisclosed identity of the witness Ron Webb. His identity had been concealed from February 13, 1985, when he gave his Grand Jury testimony to after the start of trial on May 6, 1985. All that time he had been successfully "kept under wraps." To repeat, none of this

"rule confusion" could have occurred had the responsible authorities kept their eyes upon the "pole star" that is the defendant's constitutional right to be present.

NUMBER TWO

Dealing generally with a separate part of the second assignment of error.

The text of the articulated information relayed *ex parte* to the trial judge was sealed, until after the verdict, from the accused, his lawyer, and the public. This text saw the light of day for the first time upon appellate review.[2]

Accordingly, the accused was unable to renew his motion to the Chief Justice of Ohio to disqualify the trial judge *now* from proceeding *further* by reason of the substance of the information that the trial judge had received and acted upon. *See State, ex rel. The Repository, supra.* We consider this to be a substantial denial of the right to counsel contemplated by both the Ohio and U.S. Constitutions.

Defendant's trial commenced May 6, 1985. At the conclusion of the general *voir dire* of the entire panel of jurors, the State moved the trial court to conduct a

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[2] The words of Justice Oliver Wendell Holmes take on special significance in the context of the instant case:

> The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.

Patterson v. Colorado (1907), 205 U.S. 454, 462

"certification hearing" and to "meet with the Judge and the court reporter in chambers and privately speak into the record the reasons as to why the Prosecuting Attorney has reason to certify certain witnesses, and then to have that record sealed and to be opened only for purposes of appellate procedure." T.112, Volume One – First Week of Trial.

Defense counsel again requested the trial court for permission to be present, along with the defendant, at the so-called "certification hearing" (certification had previously been made). See Crim. R. 43(A).

No representation was made that any of the other six common pleas judges were unavailable to hear those *ex parte* representations.[3]

Since, as the defense reasoned, the witnesses' testimony was to be perpetuated by means of a deposition held in the presence of defendant and his counsel, and in which the defense would be participating, conducted immediately following the "certification hearing," provided certification was ordered, the witnesses' identities would be, as in fact they were, revealed without minutes that very day. Consequently, no necessity existed to justify interference with defendant's right to be present along with his counsel, and to participate at the "certification hearing."

> We're going to know who (the witnesses) are. Now we're going to take the deposition and we're going to

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[3] The State could have avoided the quagmire of relaying *ex parte* unproved representations to the trial judge by seeking certification from one of the other common pleas judges. The State could thereby obtain certification without harming the integrity of the criminal judicial process.

> know who they are. I think for the record, so that everybody... so that I feel at ease, I feel that the Court should open this to court reporters and the public. What's the difference? I'm going to know the name, Mr. Chessler is going to know the name, the two police officers that are in there are going to know the name. So why keep it secret? Let's have it in open court.

T.113-114, Volume One–First Week of Trial.

Defendant's request was denied. T.113, Volume One–First Week of Trial.

The court reporter and the State attorneys then retired to the trial court's chambers.

At the outset, the State claimed that its purpose was to "lay...the foundation for the Prosecuting Attorney's certification of certain witnesses in this case..." (a fact that had taken place weeks earlier). T.120, Volume One–First Week of Trial.

Thereafter, the State advised the trial court of the following:

> We know through our intelligence information, that consists of the records of fellow law enforcement agencies not only in this state but in other states, we know from the state of Tennessee - Knoxville, to be exact -that the defendant acted as president of a national organization of motorcycle gangs; that gang being the Outlaws. We also have intelligence information from the El Paso Intelligence Center, known as Epic, who has documentation of individuals

who are in fact members of the National Organization of Motorcycle Gangs. The defendant has an Epic number and is in the Epic computer. We know from the investigation of this case that the defendant has been actively involved in this Outlaw Motorcycle Gang; not only in this state but also in the state of Tennessee, the state of Missouri and the state of Arizona.

T.121. Volume One–First Week of Trial.

The State did not introduce any evidence by way of testimony, records or otherwise to substantiate the foregoing representations. Those representations, and those that followed were unsworn, uncorroborated, nontestimonial, heresay recitations given by the State to the trial judge, who would ultimately be the final arbiter of defendant's fate.

The State went on to advise the trial judge that the witness it wished to certify "has material information as to the admission of guilt made by the defendant prior to being turned in." T.121, Volume One–First Week of Trial.

The State represented:

We brought this man, whose name is Ron Webb, into the Stark County Grand Jury and elicited his testimony on February 13th of this year. Later on in the month, namely February 27, 1985, we brought his wife, Connie Webb, in the Stark County Grand Jury and elicited testimony from her as well. Through testimony taken under oath it was learned that the defendant's brothers; [sic] one who is named Gregg Gillard and one who is named Dan Gillard, went to a location directly across the street from the Webb

residence and was inquiring as to the whereabouts of Mr. Webb and anyone else involved with turning their brother into the the sheriff's department. It was at this time that the defendant's brothers, sometime very close after the date of his arrest, a direct threat was made on Mrs. Webb and the threat was in the terms as follows: "Once we find out who turned our brother in, we'll level that house", and they were referring to the Webb residence.

T.122, Volume One–First Week of Trial.

Further, the State went on to relate, "The conduct of the two Gillard brothers, according to the witness, was very threatening and they indeed and in fact felt threatened by their conduct." T.122, Volume One – First Week of Trial.

The State also represented;

...that as a result of the investigation of this case and taking statements under oath from Karen Fohrenbach, who is the wife of the unindicted co-defendant Tim Fohrenbach, and a woman by the name of Vickie Henke, who is the girlfriend of the unindicted Tim Fohrenbach, it was learned that after Mr. Fohrenbach was taken into custody as a material witness in this case and in an effort to attempt to obtain his testimony against John Gillard, a threatening phone call was made to Mr. Fohrenbach's sister, where the caller said over the phone: "If Tim talks, one of his loved ones will die." Further, Mr. Fohrenbach's mother banks in this town, and I have received information that she was heard in the bank by tellers saying that their lives had been threatened as a result of Mr. Fohrenbach

being taking into custody as a material witness by the Prosecuting Attorney's office.

Also, a witness by the name of Tim Stef, who is the bartender and manager of Sandy's Fireball Express on 12th Street here in Canton, reported to the Canton Police Department that a member of the Outlaw Motorcycle Gang contacted him - I believe on two occasions - over the phone, calling himself "Big Ed," and made threatening remarks over the phone concerning witnesses who would be considered witnesses on behalf of the State of Ohio in this case. As I said, that threat was reported to the Canton Police Department and the supplement documents that.

T.122-23, Volume One – First Week of Trial.

The State closed by stating:

Therefore, in light of the nature of the circumstances surrounding this case and the threats - no only made to the witness whom I have certified by the threats that have been made to other individuals who were thought to be friendly to the State of Ohio - I felt compelled to certify the witness Ron Webb, whom I'm requesting to be deposed, who indeed not only turned the defendant in to the police but also has information coming from the defendant as to his guilt.

T.124, Volume One – First Week of Trial.

The trial court ordered certification, and also ordered the record of the certification hearing sealed, not to be opened

"until such time as an appellate court would want to review the record." T.124, Volume One - First Week of Trial.

The testimony of the witness, Ron L. Webb, was perpetuated immediately following the certification hearing, in the presence of defendant and his attorneys, wherein the defense learned the identity and address of the witness. T.125, *et seq.*, Volume One - First Week of Trial.

NUMBER THREE

Dealing with the sixth assigned error.

In a series of incidents, the trial judge tolerated, after objections were sustained, the repeated continued perseverance in misconduct by the assistant prosecutor. This unintentionally but reasonably led the jury to believe that the trial judge had formed an opinion that the accused was guilty as charged. *See State v. Boyd* (7/1/85), Stark App. No. CA-6536, unreported, Motion to Certify overruled 10/18/85, Sup. Ct. No. 85-1324.

> In our opinion, it is inexcusable for a lawyer for the government engaged in a criminal prosecution to continue a line of jury argument after an objection has been sustained. The spectacle of unpunished perseverance in the same argument after the objection has been sustained reasonably leads the jury to conclude that the trial judge is so sympathetic to the government's position that disobedience will be tolerated for the sake of what must then appear to the jury to be a "higher justice" in the court's tacit opinion.

Boyd, supra, at 12-13.

Finally, as in *Boyd*, we are convinced that the trial court in the instant case:

> ...by its failure to control the prosecutor, denied the accused a fair trial of that pivotal credibility issue. Specifically, the court inadvertently permitted the jury reasonably to conclude that, in the tacit opinion of the trial judge, the defendant was guilty.

Boyd, supra, at 6.

See 27 O.Jur.3d, Criminal Law, Sec. 944 (offering improper evidence or asking improper question).

NUMBER FOUR

This deals with a subject pointed out in the tenth assignment of error complaining of ineffective assistance of counsel.

The trial judge substantially impaired defense counsel's right to pursue, at the guilt phase of the bifurcated proceeding, the tactical strategy of handling the defense upon the basis that whoever was guilty of the crimes charged deserved the death penalty, but that his client was not guilty, hence there would be no claim made that mitigating factors existed. *See* T.580-582, 674-676, Volume One – First Week of Trial, photocopied and attached. This interference took place upon *voir dire* examination of prospective jurors, and however well intentioned, it impermissibly and substantially impaired the defendant's separate constitutional rights to counsel and to defend himself by being free to choose his own defense strategy.

NUMBER FIVE

This deals with elements of the second and sixth assigned errors.

The prosecution, over repeated objections, cross-examined the defendant by a series of questions containing the same information that the prosecutor told *ex parte* to the trial judge before the jury had been impaneled and sworn. T.113-121, Volume One – First Week of Trial. Generally, these questions were accusations that the accused had committed a series of other crimes and that he was a "national enforcer" for a criminal motorcycle gang. All such questions were categorically denied by the accused. (They were never proved by the prosecutor.) The defense rested at the conclusion of defendant's testimony, and within minutes the State declared its intention to put on no rebuttal evidence. Subsequently, the prosecution in fact rested without calling a single rebuttal witness to the facts asserted in the cross-examination questions. Defense counsel immediately renewed all prior motions, and a motion for mistrial was overruled.

A plethora of precedents, condemns this type of misconduct. The authorities are long standing and voluminous. *See* Annot., "Prosecutor's Reference In Opening Statement To Matters Not Provable Or Which He Does Not Attempt To Prove As Grounds for Relief" 16 A.L.R.4th 810 (and cases cited therein); Annot., "Propriety and Prejudicial Effect of Prosecutor's Argument To Jury Indicating That He Has Additional Evidence of Defendant's Guilt Which He Did Not Deem Necessary To Present," 90 A.L.R.3d 646 (same); 58 Am.Jur.2d, New Trial, §§57, 58, 70, 71 (same); 63A Am.Jr.2d, Prosecuting Attorneys, §27 (same); 75 Am.Jur.2d, Trial, § 209 (same). By whatever name they are indexed and cataloged (bad faith, misconduct, etc.), the essential mischief

is that the jury is persuaded to believe that the unproved facts suggested by the prosecutor's questions must be true, otherwise the judge would not have tolerated their having been asked nor would an ethical prosecutor have asked them. Accordingly, the fact of the asking of the question appears as the prosecutor's personal assurance that the facts therein stated are true. On this particular record, there was manifestly a substantial and impermissible infringement of the right of the accused to have his credibility judged in a fair atmosphere.

Obviously, the prosecutor was totally unprepared and had never intended to prove any of the assertions, all of which were categorically denied.

NUMBER SIX

Dealing with assignments six, seven A and B, eight and nine.

Throughout the six weeks of this hotly contested trial, there were many rulings by the trial judge, adverse to the accused, upon the admission or exclusion of evidence and the conduct of the interrogation of witnesses by the lawyers for each side. Some of these rulings are separately assigned as error.

Ordinarily such rulings pass muster upon appeal because they are said to rest within the "sound discretion of the trial judge." Appellate courts refrain from interfering merely because they might have "called the shot" differently had they been "in the shoes" of the trial court.

In this case, it is fair to say that there is no way to know the extent to which such rulings, adverse to the accused, were

influenced by the information furnished to the trial court, in the absence of the accused and his counsel, the text of which was unknown to them throughout the trial. The problem is aggravated by the appearance that the trial judge acted upon it in excluding the public from the perpetuation hearing. The nature of that specific information in this particular case is, in our opinion, so damaging as to destroy the integrity and fairness of the guilt-finding process.

There is no showing that any of the other six common pleas judges were unavailable to make the order preserving the testimony of the alleged threatened witness. In fact, on April 22, 1985, Judge Morris ordered the accused to give blood and saliva samples. This creates the appearance that the prosecution had a specific purpose when it put the information *ex parte* into the mind that had to make all the discretionary procedural rulings in the guilt-determination phase of the trial and ultimately had to decide whether death was an appropriate penalty. This influence is subtle but all the more effective and invidious because of that subtlety.

We conclude that it reasonably appears that the trial court failed to act upon the objection to the unproved prosecution's assertions in cross-examination of the defendant because he had earlier become convinced as to the truth of those matters by the *ex parte* communication from the prosecution.

It being our judgment that each of the foregoing separate errors would, standing alone, require reversal, it follows that the accumulation of them does likewise. Accordingly, we do not have any occasion to pass upon the other claimed errors, most of which deal with the death penalty. *See Dupler v. Mansfield News Journal* (1980), 64 Ohio St.2d 116, 125.

We move now to treat the formal assigned errors in conformance with App. R. 12.

The text of each assignment of error will be set forth in full after the Roman serial number assigned it by appellant's counsel.

I

THE TRIAL JUDGE COMMITTED PREJUDICIAL ERROR BY FAILING TO DISQUALIFY HIMSELF IN PARTICIPATING IN THE CRIMINAL PROCEEDINGS AGAINST DEFENDANT IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; ARTICLE 1, SECTION 10 OF THE STATE CONSTITUTION; THE CODE OF JUDICIAL CONDUCT; AND THE RECOGNIZED PUBLIC POLICY OF THE UNITED STATES AND THE STATE OF OHIO.

OVERRULED. *See State v. Rogers* (1985), 17 Ohio St.3d 174, 176.

II

THE CRIMINAL RULE 16 (B)(1)(e) CERTIFICATION PROCEDURE USED BY THE STATE AND SANCTIONED BY THE TRIAL JUDGE VIOLATED DEFENDANT'S FUNDAMENTAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, CONFRONTATION OF WITNESSES AND DUE PROCESS OF LAW GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED

STATES CONSTITUTION AND ARTICLE 1, SECTION 10 OF THE STATE CONSTITUTION.

SUSTAINED. *See* our discussion of this issue under one and two *supra*.

III

THE FAILURE OF THE STATE TO DISCLOSE TO THE DEFENDANT THE IDENTITY OF A WITNESS FOR THE STATE WHO WOULD TESTIFY CONCERNING AN ADMISSION OF GUILT BY THE DEFENDANT AND THE STATEMENT OF THE DEFENDANT ADMITTING GUILT VIOLATED DEFENDANT'S DUE PROCESS RIGHTS AND HIS RIGHT TO CONFRONT WITNESSES AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE STATE CONSTITUTION.

OVERRULED. Absent a motion for continuance, there is no prejudice from failure to make pre-trial disclosure.

IV

THE NON-NEUTRALITY OF DEATH QUALIFIED JURIES VIOLATES A CAPITAL DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A JURY THAT IS FAIR AND IMPARTIAL AND REFLECTS A FAIR CROSS-SECTION OF THE COMMUNITY DURING THE TRIAL OF GUILT OR INNOCENCE.

OVERRULED. *See Lockhart v. McCree* (1986), 476 U.S. ___, 106 S.Ct. 1758, 90 L.Ed.2d 137 (holding that removal, before the guilt phase of capital trial, of prospective jurors whose opposition to death penalty would impair or prevent performance of their duties at sentencing phase is not unconstitutional).

V

STATEMENTS BY THE COURT, THE PROSECUTOR AND DEFENSE COUNSEL TO PROSPECTIVE JURORS DURING VOIR DIRE THAT THEIR VERDICT AS TO A LIFE OR DEATH SENTENCE IS MERELY A "RECOMMENDATION" MISSTATED THE LAW AND DIMINISHED THE JURY'S RESPONSIBILITY IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 2, 9 AND 16 AND ARTICLE II, SECTION 26 OF THE OHIO CONSTITUTION.

OVERRULED. The appropriateness of the death penalty in this case was not contested at trial. Moreover *see State v. Williams* (1986), 23 Ohio St.3d 16, 32-35 (Wright, J., dissenting) ("However, I must agree... that instructions that allow the jury to shift its sense of responsibility for the imposition of the death penalty are constitutionally impermissible.")

VI

THE TRIAL COURT COMMITTED ERROR PREJUDICIAL TO THE DEFENDANT BY

PERMITTING THE STATE TO ENGAGE IN IMPROPER COMMENT ON MATTERS OUTSIDE THE RECORD AND NOT WITHIN THE ISSUES OF THE CASE BEING TRIED; OVERRULING DEFENSE OBJECTIONS TO SUCH MISCONDUCT; AND REFUSING TO SUSTAIN DEFENDANT'S MOTION FOR A MISTRIAL THEREBY EXPRESSLY SANCTIONING SUCH MISCONDUCT OF THE PART OF THE STATE IN THE PRESENCE OF THE JURY.

SUSTAINED. It is elementary that the State must not comment on matters outside the record. *See People v. Crabtree* (1979), 87 Mich. App. 722, 276 N.W.2d 478.

> The primary rationale for so limiting the prosecutor's conduct is rooted in a concern that the criminal process by fair. Such conduct on the part of the prosecutor amounts to a subtle form of testimony against the defendant, as to which the defendant may have no effective means of cross-examination. Hence, the rule is founded upon the possible danger that the jury, impressed by the prestige of the office of the District Attorney, will accord great weight to the beliefs and opinions of the prosecutor.
>
> *People v. Paperno* (1981), 54 N.Y.2d 294, 301, 445 N.Y.S.2d 119, 429 N.E.2d 797.

See, also, Comonwealth v. Russell (1974), 456 Pa. 559, 322 A.2d 127.

In addition, the State must not refer to matters not within the issues of the particular case being tried. *U.S. v. Consolidation Coal Co.* (S.D. Ohio 1979), 477 F. Supp. 283.

> Such remarks unfairly exploit the prosecutor's standing and prestige with the jury as well as impair the objective detachment that should separate the attorney from the cause for which he argues. By these statements the prosecutor in effect becomes an unsworn witness whose credibility is virtually unrefutable. Gershman, Prosecutorial Misconduct (1985). Section 9.7.

See, also, 1 ABA Standards for Criminal Justice (2d ed. 1980), Standard 3-5.8(d).

Comments or references of this nature are designed by the State to impress the jury that it has knowledge of additional inculpatory evidence that cannot be presented at trial because of legal rules, trial tactics, administrative convenience, or defense objections *See Berger v. U.S.* (1935), 295 U.S. 78, 88 ("improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against an accused when they should properly carry none."); *State v. Boyd, supra.*

This is especially true where the prosecutor has been personally involved in the investigation of the case, such as participation in grand jury proceedings or interviewing witnesses.

> It is unprofessional conduct for the prosecutor intentionally to refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such fact are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

> 1 ABA Standards for Criminal Justice (2d ed. 1980), Standard 3-5.9. *See, also,* Standard 3-5.8(a) (prosecutor may not intentionally misstate evidence or mislead the jury as to inferences it may draw from evidence in the record).

See, also, Code of Professional Responsibility, DR 7-106 (c)(1); *Comonwealth v. Russell* (1974), 456 Pa. 559, 563-64, 322 A.2d 127 (district attorney's expression of personal belief to jury violates rights of the accused and professional standards of conduct).

In the general *voir dire* of the case *sub judice*, the State advised the jury, "It will also come out in evidence that this defendant's brother, William Gillard, and a friend of his by the name of Tim Fohrenbach were also involved in these crimes. However, they have not yet been indicted. They are what is known as..." T.40-41, Volume One – First Week of Trial.

The State went on to represent that "They [William Gillard and Tim Fohrenbach] are still under investigation." T.41, Volume One – First Week of Trial.

Further, the State related during general *voir dire*:

> The only person ... The point I'm trying to make is this: You're going to hear about two other people; one of them is this defendant's brother, William Gillard, the other one is a man by the name of Tim Fohrenbach. Those people are still under investigation. My point is this: Do you all understand and accept that there is only one person on trial in this courtroom and it is this defendant, John Gillard? You

understand that? The Prosecuting Attorney is taking this particular criminal situation one person at a time.

T.41, Volume One – First Week of Trial.

The State went on the relate:

The fact here - I believe I told you on Monday - you remember my telling you that this defendant - you will find out from the facts in this case - this defendant acted with others, he acted with others, namely; William Gillard and a man by the name of Tim Fohrenbach. Now, do you understand that you don't have to concern yourself - even though you're going to hear, in order to get a total picture, here about those others - you understand that there's only one person in this courtroom who is on trial this month, and that man is this defendant....

T.803, Volume V – First Week of Trial.

The State continued:

the other individuals have not been indicted; however, they are still under investigation.

T.806, Volume V – First Week of Trial.

And:

...you don't have to concern yourself with whether the State of Ohio can prove anybody else guilty beyond a reasonable doubt?

T.806, Volume V – First Week of Trial.

Finally, during cross-examination of defense witness William Gillard, the State asked: "Bill, you understand that the Grand Jury that investigated the case against the Defendant, John Gillard, has been extended and is still at this time considering evidence against you?" T.337, Volume II – Fifth Week of Trial.

The trial court permitted the State to make these comments over defense objection and motion for mistrial. The State's conduct, with the trial court's implicit approval, is the exact form of improper State conduct condemned by this court in *State v. Boyd*, *supra*. This court stated at page 11 of the *Boyd* opinion:

> From the very beginning of the preliminary examination of jurors, the court permitted the prosecutor to make what amounted to an opening statement of evidence, over defense objections, and permitted the prosecutor to argue entirely improperly over defense-objection, that what Beverly Teets [a conspirator] may have done was of no concern to the jury and to declare to the jury that the prosecution knew things about the case that the jury could ask about after the trial, and that "Beverly Teets has not *yet* been arrested. This prosecution is going step by step. This week we are trying the person who pulled the trigger.

By the same token in the case *sub judice*, the State's comments to the jury described above were designed to impress the jury that the State had knowledge of facts about this case that "the jury could ask about after the trial."

This misconduct on the part of the State, coupled with the trial court's approval, constituted prejudicial error.

VII, Part 1[5]

THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT BY ADMITTING EVIDENCE OF PRIOR ALTERCATIONS AND SHOOTINGS INVOLVING DEFENDANT AND OTHERS THAT HAD NO PROBATIVE VALUE WHATSOEVER TO THE ISSUES OF THIS CASE AND WAS HIGHLY PREJUDICIAL, SAID EVIDENCE PORTRAYING DEFENDANT AS AN EVIL AND MALIGN BEING IN VIOLATION OF EVID.R. 403(A).

SUSTAINED.

This assignment of error groups together details of another shooting. The fact of the shooting itself was relevant to show comparisons of shell casings at the crime scene with those at a separate place at an earlier time. The relevance of the shell casings is acknowledged by appellant's counsel. The complaint goes to the excessive detail showing the accused to be generally a vicious and dangerous man.

We agree that the trial court permitted the prosecutor to go far beyond what was necessary to connect the shell casings, and allowed the prosecutor to show a disposition to violence on the part of the accused as proof that he probably acted that way in respect of the crime charged, in violation of Ohio Evid.R. 404(A) and (B).

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[5] Appellant ascribed by oversight "VII" to two separate assignments of error.

(A) Character evidence general. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion...

(B) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Its exclusion is mandated by Evid.R. 403(A):

Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

VII, Part 2

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PERMITTING THE STATE TO ENGAGE IN A HIGHLY IMPROPER LINE OF QUESTIONING WHEREBY THE STATE USED KEY DEFENSE WITNESS WILLIAM GILLARD'S NO CONTEST PLEA TO A MISDEMEANOR THAT, INCIDENTALLY, DID NOT INVOLVE DISHONESTY OF FALSE STATEMENT, TO IMPEACH HIS CREDIBILITY AND PROVE THAT HE COMMITTED THE CRIME, THUS BOLSTERING THE TESTIMONY OF KEY STATE WITNESS, RON POSTLETHWAITE.

SUSTAINED, IN PART, as to the improper line of questioning, but OVERRULED as to the use of the plea of no contest.

Ron Postlethwaite, a victim of the Kennet Court shootings, testified at defendant's trial that he had observed William Gillard, defendant's brother, fire a pistol into the air behind the Kennet Court residence in the early morning hours of January 1, 1985, a few hours before the fatal shootings. T. 16-17, Volume I – Week of May 20-24, 1985.

During the direct examination of defense witness William Gillard, defense counsel asked the witness:

> Now on December 31, William, and January 1, did you ever have a gun in your possession?

T. 332, Volume II – Fifth Week of Trial.

The witness answered, "No." T. 332, *supra*.

To impeach William Gillard's credibility, the State asked a series of questions.

> Bill, you understand that the Grand Jury that investigated the case against the Defendant, John Gillard, has been extended and is still at this time considering evidence against you?

T. 337. Volume II – Fifth Week of Trial.

The State also asked William Gillard:

> Prior to coming in here today Louis Martinez was your attorney and represented you at the Preliminary Haering [sic], is that correct?
>
> T. 339, Volume II – Fifth Week of Trial.

Objections to both questions were sustained by the trial judge. T. 338, 340, Volume II – Fifth Week of Trial.

The State, ignoring the trial court's rulings, continued this line of improper examination.

> And Ron Postlewaite at that hearing [referring to a preliminary hearing] stated that you, Bill Gillard, were outside 213 Kennet Court sometime after you left the party with a fight with Ensign and that you discharged a firearm out the back door, and in fact you plead and were found guilty of...
>
> T. 393, Volume II – Fifth Week of Trial.

Despite repeated defense objections, the State continued in an attempt to complete the question by stating:

> [objection]...firing that same shot...[objection]...that Mr. Postlewaite testified to.
>
> T. 393-394, Volume II – Fifth Week of Trial.

Finally, in admonition from the trial court stopped this improper line of questioning. T. 394, Volume II – Fifth Week of Trial.

At first the trial judge felt that Evid.R. 609(A) permitted this line of questioning for the purpose of impeaching the witness's statement. T. 397, Volume II – Fifth Week of Trial.

However, defense counsel claimed that the defense witness had pled no contest to discharging a firearm, a misdemeanor, in the Canton Municipal Court, and this could not be used against the defendant in any manner, notwithstanding a finding of guilty by the Municipal court. T. 397-401, Volume II – Fifth Week of Trial. *See* T. 443, Volume III – Fifth Week of Trial.

The trial judge, upon reflection, permitted the State to use a modified version of the question opining that the questioning would be proper under Evid. R. 608(B).

> Based upon Rule 608(B) and with the foundation of the witness having answered on direct examination the question of defense counsel as to whether or not he ever had a gun in his possession on January 1st or December 31st, and answering "no", uh, the Court in the Court's discretion is allowing cross examination of the witness on the conduct of the witness for the purposes of attacking the credibility of the witness as to truthfulness or untruthfulness, may ask the question, absent the part as to anyone's testimony at the tiem [sic].

T. 423, Volume III – Fifth Week of Trial.

Defense counsel objected to allowing the State to use a misdemeanor conviction based on a no contest plea for purposes of impeachment. T. 424-431, Volume III - Fifth Week of Trial.

The State's next question to the defense witness failed to refer to the no contest plea.

> And you were found guilty at the preliminary hearing of discharging a firearm in the City of Canton behind 213 Kennet Court prior to the time these murders occurred, were you not?
>
> Answer: Yes.
>
> T. 433, Volume III - Fifth Week of Trial.

Finally, the State had the witness admit that he went to jail after being found guilty of the offense.

> And you got out of jail from the preliminary hearing and from being found guilty on that charge around the end of January isn't that correct?
>
> T. 433-434, Volume III - Fifth Week of Trial.

In our opinion, the trial court committed prejudicial error by permitting the State to examine defense witness William Gillard in this manner, notwithstanding that proper questions might have been used as hereinafter set forth.

The second complaint under this assignment is based upon Crim.R. 11(B)(2), with provides:

> The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint and such plea or admission shall not be used

against the defendant in any subsequent civil or criminal proceeding.

(Emphasis added.)

State v. Pernell (1976), 47 Ohio App.2d 261, 264 holds:

> A plea of no contest is considered a useful device by which a defendant may admit his liability to punishment without his admission being used against him in any subsequent civil or criminal preceding.

Thus, the question is whether upon this record Crim.R. 11(B)(2) prohibits the State's use of defense witness William Gillard's no contest plea to prove that he fired a gun in back of Kennet Court on the day of the shootings. In our opinion, neither the spirit nor the letter of the rule allows a witness to commit perjury.

Evid.R. 608 in its entirety reads:

> RULE 608. EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS
>
> (A) Opinion and Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitation: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for trustfulness has been attacked by opinion or reputation evidence or otherwise.

(B) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if clearly probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Evid.R. 609(A) reads:

(A) General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or (2) involved dishonesty or false statement, regardless of the punishment whether based upon state or federal statute or ordinance.

The point is that if all that was involved was general impeachment of credibility of the witness, William Gillard, then the evidence of his conviction would be inadmissible

because it fails to qualify under either branch (1) or (2) of Evid.R. 609(A).

However, in the instant case, the witness, William Gillard, took the stand as a defense witness in a case where he was not a party and gave a positive evidence on a point of fact. If his testimony was directly contradictory to the facts in the complaint he precisely admitted by his no contest plea, then the shield of Crim.R. 11(B)(2) would not bar the state from showing the contradiction. This is not merely to impeach his credibility generally, but as evidence directly contradictory to his testimony in chief.

Compare Harris v. New York (1971), 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1, *citing Walder v. U.S.* (1954), 347 U.S. 62, 74 S.Ct. 354. 98 L.Ed. 503.

In *Walder*, Justice Frankfurter said:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the [exclusionary rule] would be a perversion of the Fourth Amendment.
>
> Take the present situation. Of his own accord, the defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the sweeping claim that he had never dealt in or possessed any narcotics. Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the

elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to prejurious testimony in reliance on the Government's disability to challenge his credibility.

VIII

DURING THE COURSE OF APPELLANT'S TRIAL THE STATE ENGAGED IN PROSECUTORIAL MISCONDUCT CONTRARY TO THE FIFTH, SIXTH AND, FOURTEENTH AMENDMENTS TO THE UNITED STATE CONSTITUTION; ARTICLE I SECTION 10 OF THE STATE CONSTITUTION; EVID.R. 404; EVID.R. 608; CODE OF PROF. RESP. DR7-106 (C)(4); AND ABA STANDARDS FOR CRIMINAL JUSTICE SECTIONS 5-5.6 (2d Ed. 1983).

SUSTAINED.

It is the duty of a lawyer engaged in a criminal prosecution "to refrain from improper methods calculated to produce a wrongful conviction..." This is mandated by the Fifth, Sixth and Fourteenth Amendment to the United States Constitution. *Berger v. United States* (195), 295 U.S. 78, 88, 55 S.Ct. 629 633, 79 L.Ed. 655;

> The United States Attorney is the representative not of an ordinary part to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and

> whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

This duty is also recognized in DR 7-106(C)(4) of the Code of Professional Responsibility and 1 ABA Standards for Criminal Justice, Standard 3-5.6 (2d Ed. 1980). *See State v. Smith* (1984), 14 Ohio St.3d 13 (prosecution's statements in closing argument that went beyond the record, were not substantiated by evidence, and characterized defendant in derogatory terms constituted prejudicial misconduct).

> ...[the prosecutor's] role is more than mere advocate for the state, rather, he has an obligation to proceed fairly to assure the innocent are not punished.
>
> *State v. Staten* (1984), 14 Ohio App.3d 78, 84.

The prosecutor's remarks cannot infringe upon specific guarantees embodied in the Bill of Rights. *Mostade v. Engle* (N.D. Ohio 1980), 507 F.Supp. 402, 408. "When specific guarantees of the Bill of Rights are involved," the court must take "special care to assure that prosecutorial conduct in no way impermissibly infringes them." *Donnelly v. DeChristoforo* (1974), 416 U.S. 637, 643.

See State v. Roberts (1976), 48 Ohio St.2d 221.

> When a prosecutor acts contrary to this obligation in order to procure convictions by his misconduct the integrity of the judicial system itself is tarnished. Consequently such conduct cannot be tolerated.

State v. Staten, *supra*, at 85.

As Mr. Justice Brandeis, dissenting, said in *Olmstead. v. United States* (1928), 277 U.S. 438, 585, 72 L.Ed. 944, 959, 48 S.Ct. 564, 66 A.L.R. 376:

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its examples ... If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself, it invites anarchy.

After the jury was impaneled, and throughout the course of the entire trial, the State repeatedly referred to defendant as "Dirty John." The keynote of the prosecutions' opening statement was this closing sentence:

> He's known as Dirty John Gillard, and by the time this case is over and Mr. Reinbold and I take this case and place it into your hands, you are going to know exactly why that man is known as Dirty John.

T. 675, Volume IV – Week of May 13, 1985.

Indeed, the State concluded its cross-examination of the accused with the following rhetorical "spot light" question:

> And the reason they call you Dirty John Gillard is because the next thing that you did was to shoot an

innocent sleeping woman on a couch and put a bullet in her head, and that's why you're called Dirty John, isn't it?

T. 963-64, Volume ___ - Fifth Week of Trial (June 7, 1985)

Manifestly, the question called for no answer.

The State also engaged in a course of cross-examination of the defendant which enabled the jury to infer that the defendant was at one time the national president of a motorcycle gang called the "Chosen Few" (T. 851-852, Volume ___ - Fifth Week of Trial, Friday, June 7, 1985); that he had also been a member of the "Outlaws," another motorcycle gang (T. 852, Volume ___ - Fifth Week of Trial, Friday, June 7, 1985); that the "Chosen Few" and the "Outlaws" were on the same order as the "Hells Angels" (T. 856, Volume ___ - Fifth Week of Trial, Friday June 7, 1985); that the members of the gangs wore colors, i.e., items of clothing "drenched in human excrement, urine..." (T. 859, Volume ___ - Fifth Week of Trial, Friday, June 7, 1985); the defendant was an "enforcer," a member of a motorcycle gang that would go from gang to gang "to enforce the rules..." (T. 861, Volume ___ - Fifth Week of Trial, Friday, June 7, 1985); and that defendant would go from town to town, throughout he nation, "as a national enforcer form the Outlaw motorcycle gang..." (T. 864, Volume ___ - Fifth Week of Trial, Friday, June 7, 1985). The State finished this line of questioning at T. 885, Volume ___ - Fifth Week of Trial, Friday June 7, 1985).

The State also made repeated references to defendant's associates a members of "motorcycle gangs." For example, at T. 540,Volume IV-A(3) - Fourth Week of Trial, the State

asked a defense witness if he knew that one of defendant's friends was a member of a motorcycle gang in Arizona. *See also* T. 542, Volume IV-A(3) - Fourth Week of Trial.

> As a matter of fact, you and Fohrenbach [defendant's friend] were members of the same Dirty Dozen motorcycle gang, weren't you? And that is a national motorcycle gang; isn't it?...Headquarters are in Arizona, aren't they?...Well you were a biker: Is that what people commonly refer to people who belong to motorcycle gangs? [referring to witness]
>
> T. 845-46, Volume IV-A(5) - Fourth Week of Trial.

See also T. 54-55, Volume I – Fifth Week of Trial, where the State asked another defense witness:

> And he's a member [referring to defendant's brother Mike] of the Dirty Dozen Motorcycle Gang, also isn't he? So McKimmie (one of defendant's friends) was a member and Fohrenbach [another of defendant's friends] was a member and Mike Gillard [defendant's brother] was a member, and was Jim [another brother of defendant] a member at the time?

The State informed the jury that it took five armed law enforcement officials to transport defendant from West Virginia to Ohio, T. 378, Volume III – Week of May 20-24, 1985, after apprehending him by aiming weapons at him, including an M-16 A-1 rifle. T. 321, Volume IV-A(2) – Fourth Week of Trial.

Evid.R. 404(A) states in part:

> Evidence of a person's character or a trait of his character is not admissible for the purpose of proving

> that he acted in conformity therewith a particular occasion...

Although evidence of other crimes may logically tend to establish that a defendant committed the act for which he stands accused, the evidence is considered legally irrelevant because of:

> (1) The overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts: (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated; and (4) the confusion of issues which might result from bringing in evidence of other crimes.
>
> *State v. Curry* (1975), 43 Ohio St.2d 66, 68 (quoting *Whitty v. State* (1967), 34 Wis.2d 278, 292, 149 N.W.2d 557).

The State repeatedly continued a line of improper questioning after the court had sustained defense objections or had admonished the State for pursuing improper questioning. This occurred when the court instructed the State not to inquire into post-arrest silence of the Gillards.

The State and defense counsel were admonished by the trial court at T. 673-674, Volume IV - Week of May 13, 1985:

> Also both counsel from time to time during the voir dire have brought before the jurors certain matters that should better have been discussed at the side bar. And

> the zeal of the counsel to stress their point to the court without going through the safeguard of refraining until the matter could be discussed at the side bar outside the hearing of the jury. The court insists that any such arguing or statements on the part of counsel for both sides not take place and that where the court rules or is about to rule on an objection or any other matter, if there is want to stress to the court, my instructions are to ask for a side bar conference and that will take place outside of the hearing of the jury.

And at T. 443, Volume IV-A(3) – Fourth Week of Trial (in chambers outside the hearing of the jury):

> THE COURT: Wait a minute. Don't raise your voice. Now look, let's get one thing straight and I don't like it when you do it, okay.
>
> MS. WYLER: I don't believe I've done it this week and I'm trying to refrain from that.
>
> THE COURT: When I say you, I'm talking about you and your associate, and I don't like it when either one of you do it and you've done it several times...

In the case *sub judice*, the repeated misconduct took place in the presence of the jury, but the above remonstrance did not.

This Court of Appeals stated in *State v. Boyd*, *supra*:

> In our opinion, it is inexcusable for a lawyer for the government engaged in a criminal prosecution to continue a line of jury argument after an objection has been sustained. The spectacle of unpunished

perseverance in the same argument after the objection has been sustained reasonably lead the jury to conclude that the trial judge is so sympathetic to the government's position that disobedience will be tolerated for the sake of what must then appear to the jury to be a "higher justice" in the court's tacit opinion.

IX

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO EXERCISE ITS MANDATORY *SUA SPONTE* DUTY TO STOP IMPROPER CONDUCT ON THE PART OF THE STATE DURING THE COURSE OF DEFENDANT'S TRIAL.

SUSTAINED. This point has been covered above

X

AT ALL PHASES OF THE PROCEEDINGS AGAINST THE DEFENDANT, DEFENSE COUNSEL FAILED TO RENDER ADEQUATE LEGAL ASSISTANCE IN VIOLATION OF THE DEFENDANT'S RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 'I, SECTION 10 OF THE OHIO CONSTITUTION, AS WELL AS DUE PROCESS PROTECTIONS UNDER THE FOURTEENTH AMENDMENT TO THE UNTIED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

OVERRULED. We find no breach of any essential duty of defense counsel. Based on the totality of the evidence, appellant's trial counsel's performance satisfied constitutional requirements. *Strickland v. Washington* (1984), 466 U.S. 668. *Compare State v. Johnson* (1986), 24 Ohio St.3d 87. *See generally, Berger*, "The Supreme Court and Defense Counsel: Old Roads, New Paths - A Dead End?" 86 Colum. L. Rev. 9 (1986).

XI THROUGH XIX

These assignments of error inclusive are nine separate complaints against the death penalty generally and each has been authoritatively decided by precedents binding upon us. Those assignments are each OVERRULED upon the following authority.

State v. Jenkins (1984), 15 Ohio St.3d 164, *cert. denied* (1985), ___ U.S. ___, 87 L.Ed.2d 643.

State v. Maurer (1984), 15 Ohio St.3d 239, *cert. denied* (1985), ___ U.S. ___, 86 L.Ed.2d 728.

State v. Buell (1986), 22 Ohio St.3d 124.

For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County is REVERSED and this cause is remanded to that court for further proceedings according to law. Wise, J. Concurs, and Milligan, J. dissents.

/s/_____

/s/_____
JUDGES

APPENDIX M

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

CASE No. 1985-CR-5023

[Filed June 19, 1985]

STATE OF OHIO	)
Plaintiff	)
	)
v.	)
	)
JOHN GRANT GILLARD	)
Defendant	)
	)

JUDGE UNGER

OPINION

On January 1, 1985, the crimes which gave rise to the indictment of John Grant Gillard occurred at the Canton, Ohio residence of one Tim Hendricks following a New Year's Eve party. After the party ended, the residents and some of their friends who had attended the party, including the three victims, went to sleep in various places within the house.

Ron Postlethwait, the sole survivor among the three victims, testified that as he and his girl friend, Denise R.

Maxwell, lay on the couch in the living room he heard the back door fly open and heard a shot from the kitchen area. Moments, later, someone grabbed him by the hair and turned his head so that he was looking into the face of a man whom he recognized as John Gillard. He stated that Gillard, whom he identified in the courtroom during trial, then shot him through the head and threw him to the floor. He stated that he then watched Gillard shoot Denise Maxwell who was still lying on the couch.

Three spent bullet casings were found by police officers at the scene, including one at or near the kitchen area where Leroy T. Ensign, one of the victims, had been sleeping. An F.B.I. firearms expert testified that these three casings had been shot from the same gun.

Another witness, Ron Webb, testified that three days following the killings the Defendant came to his house in West Virginia and told him, "I pulled the trigger, my brother's taking the fall".

This cause proceeded to trial on a seven count indictment which included four counts of aggravated murder, each with two specifications of aggravating circumstances, two counts of attempted aggravated murder and one count of aggravated burglary. More specifically, under the authority of R.C. 2941.04, the State charged the Defendant in both counts one and two for the aggravated murder of Denise R. Maxwell in alleging that he violated R.C. 2903.01(A) in count one and 2903.01(B) in count two. Similarly, the State charged the Defendant with the killing of Leroy T. Ensign in counts three and four and with the attempted aggravated murder of Ronnie W. Postlethwait in counts five and six. In count seven, the Defendant was charged with the commission of aggravated burglary. Accordingly, the State alleged a purposeful killing

or attempted killing with prior calculation and design as to each of three victims and in addition the purposeful killing or attempted killing of each of the three victims while committing or attempting to commit or while fleeing immediately after committing or attempting to commit aggravated burglary.

The jury found the Defendant guilty of all seven counts and guilty of two specifications of aggravating circumstances as to each count of aggravated murder, and recommended the death penalty as to each one of the four aggravated murder counts. The guilt-innocence phase of the trial lasted six weeks. Five days following the return of the guilty verdicts, the sentencing phase of the trial commenced. The defense elected to put on no evidence as to mitigating factors and further elected that the Defendant would make no statement in his own behalf. The State then elected to put on no evidence. The State, however, offered all of its exhibits which had been received as evidence during phase one and such exhibits were received by the court with respect to phase two. Both parties then rested with no testimony having been offered. Final arguments were received. The thrust of the argument of defense counsel was that no mitigating factors apply to this Defendant for the reason that he was not present at the scene of the crimes and did not commit the crimes. The thrust of the State's arguments was the strength of the aggravating circumstances as found by the jury at the end of phase one.

The court has reviewed and independently weighed all of the testimony and other evidence in this case and has applied to that testimony and evidence the law as contained in the charge given to the jury by the court -- that as identified "Appendix A" given at the end of phase two -- which is attached to ths opinion and included as a part hereof. In addition, the court has considered all of the mitigating factors

which the jury was given to consider as set forth in pages ten and eleven of the jury instructions identified as "Appendix A".

The jury having found the Defendant guilty of aggravated murder and guilty of two specifications of aggravating circumstances as to each of counts one, two, three and four of the indictment and thereafter having found beyond a reasonable doubt as to each of said four counts that the aggravating circumstances which the Defendant was found guilty of committing are sufficient to outweigh the mitigating factors present, pursuant to section 2929.03 of the Revised Code of Ohio. The court has proceeded to consider the relevant evidence raised at the trial, the testimony and arguments of counsel. Having done so, the court finds by proof beyond a reasonable doubt as to each of said four counts that the aggravating circumstances the Defendant was found guilty of committing outweigh the mitigating factors.

The court finds that the four counts of aggravated murder which the jury found the Defendant guilty of committing are as follows:

COUNT ONE: The purposeful killing of Denise R. Maxwell with prior calculation and design, in violation of R.C. 2903.01(A).

COUNT TWO: The purposeful killing of Denise R. Maxwell while committing or attempting to commit aggravated burglary or while fleeing immediately after committing or attempting to commit aggravated burglary, in violation of R.C. 2903.01(B).

COUNT THREE: The purposeful killing of Leroy T. Ensign, personally, or in aiding or abetting another and/or

others in the commission of said killing, and with prior calculation and design, in violation of R.C. 2903.01(A).

COUNT FOUR: The purposeful killing of Leroy T. Ensign, personally or in aiding or abetting another and/or others in the commission of said killing while committing or attempting to commit aggravated burglary or while fleeing immediately after committing or attempting to commit aggravated burglary, in violation of R.C. 2903.01(B).

The aggravating circumstances which the jury found the Defendant guilty of committing as to each of counts one and two and which the court specifically finds by proof beyond a reasonable doubt that the Defendant committed were the following:

(1) The commission of the offense of aggravated murder of Denise R. Maxwell as part of a course of conduct involving the purposeful killing or attempted killing of two or more persons.

(2) The commission of said offense or aggravated murder of Denise R. Maxwell while committing or attempting to commit or while fleeing immediately after committing or attempting to commit aggravated burglary and John Grant Gillard was the principal offender in the commission of aggravated murder.

As to each of counts one and two, the court finds the existence of certain mitigating factors as follows:

(1) There has been no evidence of any significant history or prior criminal convictions and delinquency adjudications with regard to the Defendant.

(2) The evidence supports the fact that the Defendant had been consuming alcoholic beverages prior to the commission of the killings, including that of Denise R. Maxwell, with reference to counts one and two.

The court finds that while the Defendant has no significant history of prior criminal convictions and delinquency adjudications that this factor carries little weight in comparison to the weight of the aggravating circumstances which the Defendant was found guilty of committing as to counts one and two. Further, the mitigating factor that the Defendant had been consuming alcoholic beverages prior to the commission of the killings, considered by itself or with any other mitigating factors carries little weight. The evidence, including the Defendant's own testimony and that of the witnesses who testified in the Defendant's behalf, does not support any concept that the Defendant's mental processes or his ability to reason had been affected in a way to cause him to engage in criminal conduct.

Considering these two mitigating factors independently or collectively as against the aggravating circumstances which the Defendant was found by the jury to have committed and which aggravating circumstances the court independently finds beyond a reasonable doubt that the Defendant committed as to counts one and two, the court finds by proof beyond a reasonable doubt that the aggravating circumstances outweigh the said mitigating factors.

This court has also considered and made an independent judgment as to the other mitigating factors which are listed on pages ten and eleven of "Appendix A", attached, and finds as follows:

(1) The nature and circumstances of the offense in no way support any concept of mitigation regarding the aggravated murder by the Defendant of Denise R. Maxwell, and this factor is not applicable to mitigation as to counts one and two.

(2) As to the character and background of the offender, John Grant Gillard, according to the evidence he is now forty years of age. As a boy he spent much of his time working on motors. As an adult he has been actively engaged as a member of motorcycle "clubs" such as "The Chosen Few", "The Night Riders" and "The Outlaws". In conjunction therewith, the evidence supports the fact that he has traveled fairly extensively from state to state in the company of the members of these groups. There is nothing in the evidence which causes this factor to become applicable as to mitigation, and the court finds that this factor is not applicable as to counts one and two.

(3) In considering the factor or whether the victim, Denise R. Maxwell, induced or facilitated the crimes as to her, the facts clearly indicate that she was asleep on a couch at the time the Defendant shot her. There is no evidence to indicate that she in any way induced or facilitated the Defendant's conduct. Accordingly, the court finds that this factor does not apply to mitigation.

(4) There being no evidence of duress, coercion or provocation as it applies to the victim, Maxwell, the factor of "whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion or strong provocation", does not apply as a factor of mitigation.

(5) The court has also considered the factor of whether "the offender was a participant in the offense but not the

principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of Denise R. Maxwell". In regard to this factor, the court finds from the evidence that the Defendant was the principal offender in the aggravated murder of Denise R. Maxwell and that he shot her at close range while she was sleeping. Accordingly, the court specifically finds that this is not a mitigating factor as to the commission of the offense.

(6) In an independent review of the evidence the court finds no other factors that are relevant in regard to mitigation as to the issue of whether the Defendant should be sentenced to death.

The aggravating circumstances which the jury found the Defendant guilty of committing as to each of counts three and four and which the court specifically finds by proof beyond a reasonable that the Defendant committed were the following:

(1) The commission of the offense of aggravated murder of Leroy T. Ensign as part of a course of conduct involving the purposeful killing or attempted killing of two or more persons.

(2) The commission of the offense of aggravated murder of Leroy T. Ensign while committing or attempting to commit or while fleeing immediately after committing or attempting to commit aggravated burglary, or while aiding and abetting another and/or others in so doing and John Grant Gillard committed the aggravated murder of Leroy T. Ensign with prior calculation and design in the commission of aggravated murder.

As to each of the counts three and four, the court finds the existence of certain mitigating factors as follows:

(1) It is unlikely that the offense would have been committed, but for the fact that the Defendant had been provoked by another and/or others in the commission of violence because of a fight which his brother, William Gillard, and Leroy T. Ensign had engaged in during a New Year's Eve party at the residence where the killing took place.

(2) There has been no evidence of any significant history of prior criminal convictions and delinquency adjudications with regard to the Defendant.

(3) The evidence support the fact that the Defendant had been consuming alcoholic beverages prior to the commission of the killings, including that of Leroy T. Ensign with reference to counts three and four.

In the consideration of mitigation factor (1) above, it is clear from the evidence that while the Defendant's brother, William Gillard, fought with Leroy T. Ensign at a New Year's Eve party at the residence where the killings later took place, the Defendant's brother was only slightly and insignificantly injured. He left the party bleeding from a facial laceration near the eye. A neighbor cleansed and administered first aid to the wound following which William Gillard testified that he was immediately able to go on his way and do the things he wanted to do. The evidence supports that fact that neither the incident of the fight nor the wound rise to the level which would justify violence of any kind against Leroy T. Ensign by the Defendant. While this incident requires consideration in a fair assessment of the issue of mitigation, the evaluation of the wight which it carries as a mitigating factor is only slight. The court finds that the

aggravating circumstances which the jury has found the Defendant guilty of committing as to each of counts three and four outweigh this mitigating factor individually or brigaded with any other mitigating factors by proof beyond a reasonable doubt.

As to factor (2) above, the court finds that while the Defendant has no significant history of prior criminal convictions and delinquency adjudications that this factor carries little weight in comparison to the weight of the aggravating circumstances which the Defendant was found guilty of committing as to counts three and four. Further, the mitigating factor ((3) above) that the Defendant had been consuming alcoholic beverages prior to the commission of the killings considered by itself or with any other mitigating factors carries little weight. The evidence including the Defendant's own testimony and that of the witnesses who testified in the Defendant's behalf, does not support any concept that the Defendant's mental processes or his ability to reason had been affected in a way to cause him to engage in criminal conduct.

Considering these three factors independently or collectively as against the aggravating circumstances individually or collectively which the Defendant was found by the jury to have committed and which aggravating circumstances the court independently finds beyond a reasonable doubt that the Defendant committed as to counts three and four, the court finds by proof beyond a reasonable doubt that the aggravating circumstances outweigh the said mitigating factors.

This court also considered and made an independent judgment as to the other mitigating factors which are listed on

pages ten and eleven of "Appendix A", attached, and finds as follows:

(1) The nature and circumstances of the offense in no way support any concept of mitigation regarding the aggravated murder by the Defendant of Leroy T. Ensign, and this factor is not applicable to mitigation as to counts three and four.

(2) As to the character and background of the offender, John Grant Gillard, according to the evidence he is now forty years of age. As a boy he spent much of his time working on motors. As an adult he has been actively engaged as a member of motorcycle "clubs" such as "The Chosen Few", "The Night Riders" and "The Outlaws". In conjunction therewith, the evidence supports the fact that he has traveled fairly extensively from state to state in the company of the members of these groups. There is nothing in the evidence which causes this factor to become applicable as to mitigation, and the court finds that this factor is not applicable as to counts three and four.

(3) In considering the factor of whether the victim, Leroy T. Ensign, induced or facilitated the crimes as to him, the facts clearly indicate that shortly prior to the time of his death he was sleeping in a chair within or near the area of the kitchen. There is no evidence to indicate that he in any way induced or facilitated the Defendant's conduct. Accordingly, the Court finds that this factor does not apply to mitigation.

(4) The court has also considered the factor of whether "if the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of Leroy T. Ensign". In regard to this factor the court finds that the degree of the Defendant's

participation in the offense and in the acts that led to the death of Leroy T. Ensign had to be substantial for the reason that the scientific evidence regarding the bullet casings found at the scene indicate that the same gun used to kill Denise R. Maxwell and to wound Ronnie W. Postlethwait was used to kill Leroy T. Ensign. This evidence, considered with the eyewitness testimony that the Defendant shot the victims Maxwell and Postlethwait heavily supports a substantial degree of participation by the Defendant in the ultimate death of Leroy T. Ensign.

(5) In an independent review of the evidence the court finds no other factors in regard to mitigation as to the issue of whether the defendant should be sentenced to death.

For the foregoing reasons, the court finds upon consideration of the relevant evidence raised at the trial, the testimony and arguments of counsel, independently and separately as to each of the said four counts of aggravated murder, that the aggravating circumstances the Defendant was found guilty of committing as to each separate count were sufficient to outweigh the mitigating factors as to each separate count.

For the foregoing reasons, the court further finds by proof beyond a reasonable doubt from an independent review of the evidence raised at the trial, the testimony and the arguments of counsel as to each of the counts one, two, three and four that any of the specifications of aggravating circumstances which the Defendant was found guilty of committing as to any one count, considered separately, outweighs any one or more mitigating factors, individually or collectively, which the court has considered as to each respective count.

/s/ _____
JUDGE JAMES G. UNGER